American Bar Association Journal

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page

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February, 1955

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East Sixtieth Street, Chicago 37, Illinois
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The President's Page

Loyd Wright

■ It had been my intention to call your attention specifically to certain matters to be acted upon at the mid-winter meeting. However, something has arisen that transcends in importance these matters and I respectfully urge you to read this message and act upon it.

You will recall that President Eisenhower in his State of the Union Message just delivered recommended to the Congress that an adjustment in compensation for the judicial and congressional salaries was long overdue.

On January 15, 1954, pursuant to joint resolution of the Congress, the report of the "Commission on Judicial and Congressional Salaries" was handed to the President, the Chief Justice, the Vice President and the Speaker of the House. This program was in furtherance of the splendid work of Morris Mitchell's Committee and action of the House of Delegates designed to rectify injustices prevailing in the scales of compensation payable to the Judicial and Legislative Branches of our Government.

Let me quote from the report:

> This Commission in the makeup of its membership and in the task assigned to it by the Congress, is unique among the special agencies which have been created to assist the Federal Government.
>
> It obviously was the intent of the Congress in establishing the Commission, and of the appointing authorities in selecting its membership, to bring to bear on the solution of a difficult problem, a representative cross-section of public thinking and judgment.
>
> By Congressional direction, the Commission members were drawn in equal numbers from the principal segments of the American economy—Agriculture, Labor, and Business and the Professions. The Agricultural members include farmers and the spokesman for one of the nation's largest farm organizations; from the ranks of labor were selected leaders of the great, integrated unions and of smaller national independent unions; the representatives of business include the head of a great transportation corporation and proprietors of modest individually-owned firms; from the professions were chosen the representative of an organization of the nation's newspaper editors, and attorneys with varied types of practice.
>
> The 18 Commission members, with their varying backgrounds and interests, were assisted by the advice and counsel of nine advisory members, six of whom were members of the Senate or the House in the 82nd or the 83rd Congresses, and three of whom were distinguished Federal jurists.
>
> In arriving at its recommendations, the Commission attached special significance to the data assembled by the task forces showing that since 1789, throughout our national history, adjustments in compensation of Federal judges and members of Congress have been made on the average, *once in every 20 years*. The practice followed in private industry, and insisted upon by leaders of organized labor, of having frequent, periodic reviews of salaries and wages, in order to provide for continual adjustments for increased living costs, added responsibilities, and improved standards has not been followed by the Congress with respect to the salaries of its own members or the members of the Federal Judiciary. Therefore, when at highly infrequent intervals salary adjustments are finally adopted for these two branches of the Federal service, they are necessarily large when compared with the total which would have resulted from more frequent reviews and adjustments.
>
> The Commissioners were also influenced by the fact that in line with the recommendations of the Hoover Commission, the compensation for all other employees of the Federal Government has been adjusted upwards *no less than five times since the last salary increase for Congressmen and members of the Federal Judiciary*. On the other hand, although made about five years ago, the Hoover Commission's recommendations for increases to Federal judges and Members of Congress have not been followed.
>
> Great weight was given the facts assembled by the task forces and the testimony offered by recognized experts at the public hearings demonstrating the tremendous new responsibilities resting on both members of the Congress and the Federal Judiciary, and the enormous increase in the complexity and difficulty of the problems with which they must contend, all a development of recent years.
>
> The duties of a Federal Judge or Congressman, resulting from the expansion of the powers and jurisdiction of the Federal Government and our new role of world leadership, are incomparably greater than they were only 20 years ago, with a consequent urgent need for top-flight ability, training, and leadership qualities, in Congress and on the Federal Bench.
>
> The Commission was impressed by the results of a survey conducted for one of the nation's leading newspapers indicating that as a result of demands of travel, dual-home maintenance, extra office expenses, un-

The Cromwell Memorial Library at the American Bar Center will be dedicated February 22. See page 163 for details.

avoidable entertainment of constituents and many charity appeals,—to say nothing of regular campaign costs —the average Congressman operates at an annual deficit of approximately $3000 insofar as his Federal salary is concerned. Other witnesses placed this deficit at substantially higher figures. The responses to the questionnaire submitted by the Commission to Federal Justices, Judges and Members of Congress, relating to their income prior to and since entering the public service, indicate that a large proportion of Members of the Judiciary and the Congress, particularly members of the United States Senate, have sources of income other than their governmental salaries. The dangers inherent in a trend which would make it possible for qualified citizens to seek election to Congress only if they have private sources of income are too obvious for comment. In addition, the responses to the questionnaires disclosed that a majority of Federal Justices, Judges and Members of the Congress suffered a decrease in income at the time of their appointment to the bench or election to membership in the U.S. Senate or House of Representatives.

Government at any level is a tremendous business. The Federal Government is in fact the world's greatest business.

It is certain that Members of Congress and the Judiciary have responsibilities as great as those of top executives in business and industry or greater; their duties require great ability and fortitude. Indeed, due to the myriad matters dealt with by Judges and Members of Congress, no other occupations are quite comparable.

The successful aspirant to Congress, like the newcomer to the Federal bench, generally is of an age of peak earning capacity in private pursuits. Men in private enterprise, with qualifications similar to those of Members of Congress and with responsibilities of considerably less magnitude earn far more money at their tasks. These large private salaries are ultimately paid for by the average American citizen through the cost of his commodities or services, just as he pays the salaries of judges and Members of Congress through taxes.

Thirteen of the highest paid executives of labor organizations surveyed, receive from $20,000 to $50,000 per year in salary. In agriculture some of the heads of farm cooperatives receive salaries of from $15,000 to $35,000 or more a year. The top officials of 100 of our largest corporations average, in round numbers, $120,000 a year with a range from $38,522 to $279,707. In 1951, the year of latest available statistics, 46 of our largest railroads paid their presidents an average of $69,270 with a range of from $40,000 to $125,000; they paid their General Counsel an average of $35,590.

It should be borne in mind that the salaries used for comparisons herein are net and do not include expense allowances for all expenses attributable to these private offices or positions, nor do they include any bonuses, retirement rights, rights for stock purchases, or survivor benefits.

The findings and conclusions briefly were as follows:

(1) The Commission concludes that the present scale of judicial and congressional salaries has not been adjusted to keep pace with the growth of the duties and responsibilities of these offices.

(2) The difference between salaries paid to Members of the Judiciary and the Congress and those paid in private enterprise to persons of similar ability, for less responsibility, has become too great.

(3) The salaries paid to the Members of the Judiciary and Members of the Congress have lagged far behind salary adjustments granted most officials of the Federal Government.

(4) The salaries of Members of the Federal Judiciary and the Congress are, and for a long time have been, grossly inadequate.

(5) The present rates of salaries for Members of the Federal Judiciary and the Congress tend to confine those positions to persons of independent wealth or outside earnings.

(6) While there is no exact formula by which salaries of Members of the Federal Judiciary and Members of the Congress can be determined, accepted job evaluation criteria and the standards historically applied to these offices indicate the amounts which are fair and reasonable.

(7) The net cost to the Government of the increases recommended.

(8) The present methods of payment of official expenses of Members of the Congress are antiquated and unrealistic.

SUMMARY OF RECOMMENDATIONS

Considering all the evidence in the record, the task force findings, and the other pertinent factors brought to its attention, it is the determination of the Commission in the exercise of its judgment that fair and reasonable compensation for the principal offices in the Judicial and Legislative branches of the Federal Government should be as follows:

Chief Justice of the United States	$40,000
Associate Justices of the Supreme Court of the United States	$39,500
Vice President of the United States	$40,000
Speaker of the House of Representatives	$40,000
Members of Congress	$27,500
Judges of the United States Courts of Appeals	$30,500
Judges of the United States Court of Claims	$30,500
Judges of the Tax Court of the United States	$27,500
Judges of the Court of Military Appeals	$30,500
Judges of the United States Court of Customs and Patent Appeals	$30,500
Judges of the United States District Courts (including the United States District Courts for the Districts of Hawaii Puerto Rico, the District Court for the Territory of Alaska and the District Court of the Virgin Islands)	$27,500

The Commission further recommends that:

(1) The traditional differential of $500 in pay between the Chief Judge of the United States District Court for the District of Columbia and the members of his Court should be added to the above-recommended compensation.

(2) In order to insure fair and reasonable compensation to the Vice President of the United States and to the Speaker of the House, the Congress should provide an adequate fund out of which the necessary expenses incurred by these officers, which are properly attributable to their offices, will be paid, on a voucher basis. No specific amount is here recommended, but this Commission does find that the present amounts are inadequate.

(3) Members of the Congress should be reimbursed, upon a voucher basis, for the actual expenses incurred in making not to exceed six round trips per year between Washington, D. C., and the District or State from which they were elected.

(4) The United States Court of Military Appeals should be provided by statute with the per diem travel allowance applicable to other Federal Judges.

The Commission, being impressed by the tremendous growth in the duties and responsibilities of the office of the Vice President of the United

(Continued on page 163)

American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East Sixtieth Street, Chicago 37, Illinois.

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Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.**

A Salute to the Journal

■ As a member of the Bar, I wish to congratulate you and the Board of Editors for publishing the letter of the Special Committee on Revision of Circular 230 in the November issue of the AMERICAN BAR ASSOCIATION JOURNAL. Because of the interest of my partner and myself in the matter of relationship of attorneys and accountants, we having, as you will recall, contributed an article in the October, 1948, issue of the AMERICAN BAR ASSOCIATION JOURNAL on "Teamwork in Tax Practice: Lawyers and Accountants Should Work Together", and having worked closely with Mr. Edwin M. Otterbourg in these matters.

The JOURNAL is rendering the American Bar a great service in this respect, as it has throughout its history, and, as members of the Bar, we wish to salute you for the signal service which you are rendering through your leadership in this particular matter.

GEORGE E. RAY
OLIVER W. HAMMONDS
Dallas, Texas

Pickets or Ballots: A Sequel

■ In our article published in the October, 1954, issue of this JOURNAL, entitled "Pickets or Ballots?", we described a growing body of court decisions circumscribing the use of pickets by unions where the facilities of a governmental agency were available to conduct an election. One of the cases discussed in the article was *Wood* v. *O'Grady*, which, at the time the article was published, had been decided by the Appellate Division of the Supreme Court of the State of New York and reported at 283 App. Div. 82. In our article we described this decision as "the high water mark by a New York appellate court in the tide of decisions enjoining unrecognized and uncertified unions from picketing. . . ."

Since the publication of the article, this decision of the Appellate Division in *Wood* v. *O'Grady* has been reversed by the New York Court of Appeals, by a vote of four to three. The four judges voting for reversal wrote three separate opinions reflecting differences in rationale among them. Further indication of the sharp division in the judicial view of this case is given by the fact that of the thirteen judges who heard the case (the trial judge, five judges in the Appellate Division and seven in the Court of Appeals) eight voted to enjoin the picketing and only five to permit it. Included in the five, of course, were the four-judge majority of the Court of Appeals.

Wood v. *O'Grady* establishes no new general principle. It confirms that recognition picketing is coercive and will be restrained. The denial of injunctive relief is based upon a combination of findings of specific facts, the most important among which were: (a) that the picketing was not directed at the employer and was not intended to exert economic pressure on him; (b) that if coercion existed it was coercion by the employer against his employees and not by the union against the employer; (c) that the sole purpose of the picketing was to enlist the support of the employees in the unionization campaign; and (d) that no irreparable damage was shown.

The decision rejects the argument that continuance of the picketing over a lengthy period of time, in this case eighteen months, converted what would otherwise be protected picketing into forbidden picketing.

In view of this latest pronouncement from the Court of Appeals, the right to an injunction where a union pickets an unorganized store, shop or plant, at least in New York State, will vary from case to case, depending on the relative success of the contending parties in satisfying the court as to the purpose of the picketing and the identity of the person or persons at whom the picketing is directed. This does not mean, as we see it, that picketing will automatically be permitted in New York State wherever it is labeled as organizational in nature. The lower and intermediate appellate court decisions up to now have indicated that judges are astute to detect attempts at masking the true purpose or objective of picketing. On the other hand, where it can be shown that the recruitment of membership is the true and sole purpose of the picketing, it seems clear under *Wood* v. *O'Grady* that such picketing will not be enjoined.

We do not believe that with *Wood* v. *O'Grady* the last word on this touchy subject has been spoken. A basic conflict between the permission granted, on the one hand, to picket for the persuasion of employees and the permission denied, on the other, to picket for the coercion of the employer still inheres in the fact that the effect of the picketing may well be, and, indeed, probably will be, the same regardless of its purpose. The employer with pickets in front of his place of business will find a drop in his volume of sales and interference with his deliveries and with his normal methods of operation no easier

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to bear because the union does not intend to cause him economic harm but only to persuade his employees to join its ranks. Nor, in many cases, will he find the will or the wherewithal to resist picketing which is not intended to coerce him economically but which, nevertheless, does so. This situation will bring more cases to the courts. The conflict between pickets and ballots has not yet been finally resolved.

DAVID L. BENETAR
ROBERT C. ISAACS
New York, New York

The Danger of Judicial Super-Government

■ Preliminarily, let me make it clear that I am opposed to segregation of the races on principle and would cast a vote as a citizen against it at every opportunity presented.

However, the recent decision of the Supreme Court of the United States on that subject, as applied to the several states, does not present the issue in that light. Involved in that decision were the greater issues of our dual form of government and judicial supergovernment. Here, again, we have the example as stated by the late Chief Justice Stone of that Court when he critically said to his brother Justices: "The only restraint we know is our own self-restraint." Unfortunately, what he said is true. History teaches us that the Supreme Court of the United States, by its decisions, determines for itself its own authority and power in cases before it and amends the Federal Constitution by such decisions just as surely as though amended by the process and procedure provided for in that Constitution. As Mr. Justice Holmes so aptly put it, that Court sits as a continuing constitutional convention. The Federal Constitution is whatever the Justices of that Court say it is. The history of the Court irrefutably proves this statement to be true. No lawyer will deny that the Supreme Court, on many occasions, has overruled its former decisions on constitutional issues, just as in the instant case on segregation, thus making the meaning of the Constitution depend upon the individual views of its members. What was perfectly constitutional yesterday becomes heresy today just because nine judges (or even five and, at times, four) say that it is. If this sort of thing is not a government of men, then I do not understand what that expression means. This is judicial omnipotence "run wild".

As a lawyer and a former judge, I say that these are issues far too important for a majority of nine judges to be the final authority on, it matters not how able, patriotic and profound they may be. I stand with Thomas Jefferson, Andrew Jackson, Abraham Lincoln and Theodore Roosevelt on this vital subject. There is nothing in the record of the Constitutional Convention remotely indicating that the Founding Fathers ever intended that the Supreme Court grow into a form of supergovernment. Tyranny can exist anywhere and, of course, most effectively where power is usurped.

What this country needs is an effective governmental restraint upon the Supreme Court of the United States. This could be accomplished by an amendment to the Federal Constitution setting up a council of revision, the members of which would be drawn from the three branches of the Federal Government and from the governments of the several states. After all, our social compact was instituted for the benefit of the people and, we hope, maintained for their benefit. If this is to be a centralized form of government, let us accomplish that revolutionary change frankly and forthrightly by a constitutional amendment rather than by attrition and surprise. I have no patience with those of our profession who seem to believe that courts can do no wrong.

The American Bar Association, rightly and wisely, has taken up the cudgels against excessive and arbi-

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trary executive power by proposing an amendment to the Federal Constitution limiting and regulating the treaty power. As one who supports that proposed amendment, believing it to be not only desirable but necessary, I equally believe that the opportunity for excesses in the judiciary should be removed by a constitutional amendment. No man or men are perfect enough to be left to their own intelligence and conscience unrestrained by a superior authority, so far as administering governmental office may be concerned. Jefferson's statement on that point is as true today as it was in the eighteenth century. Human nature has not changed. We, as lawyers, should be as alive to the abuse of judicial power as executive power. In fact, lawyers should take the lead in such reform. The people have a right to expect it of us. Lawyers know, as no other group possibly could know, the grave danger inherent in judicial power unlawfully exercised. In other words, "This is the law because I choose to say it is." If lawyers do not undertake corrective action in this field, less qualified persons will. History demonstrates that this will be the case.

Some will contend that the power of impeachment of its members is sufficient to keep the Supreme Court within lawful bounds. Such contention is erroneous on two grounds. First, no judge should be penalized for his convictions expressed in a judicial decision and, second, impeachment is wholly incompetent as a substitute for review of erroneous judicial action because it does not correct such action. *What is needed is the impeachment of the decisions of the Court, not the impeachment of its members.* History reveals the inefficiency of the remedy by way of impeachment of the individual judge. In fact, such an impeachment proceeding can do more harm than good. A failure to convict is usually construed as an approval of the conduct of the judge sought to be impeached, although a majority may have voted for his conviction, the Constitution requiring a two-thirds vote of the Senate for conviction. Both the legislative and the executive branches of government have imposed upon them adequate restraint: *a vote of the people at stated intervals.* Not so with the Supreme Court, the members of which hold office for life subject only to removal by impeachment.

I am aware that the views expressed herein do not constitute a new idea and that the decision on segregation is no different from many prior decisions of the Supreme Court where the Federal Constitution, in effect, was amended but the impact of the instant decision illumines anew the brink of the abyss of judicial supergovernment which, dangerously, lies near at our very feet. This decision is just another danger signal.

EVERETT C. MCKEAGE
San Francisco, California

A Note of Thanks

■ I want to thank you for the wonderful write-up you gave our "Fieri Faces" show in the November issue of the AMERICAN BAR ASSOCIATION JOURNAL.

You were grand to do this and I know from talking with the members of the cast how much they appreciated this article.

ARLINDO S. CATE
Chicago, Illinois

What Is a "Political" Question?

■ Mr. Louis Robertson of the Chicago Bar in a letter to the JOURNAL (December, 1954, issue)—in expressing a caveat with respect to the Association's role on "political" questions—uses the "Bricker" Amendment as the sole example of when such a caveat should be invoked.

The term "political" is often used ambiguously. Popularly it has come to refer to differences as evidenced by party affiliations—hence partisan differences. Mr. Robertson seems to use it in this sense. Otherwise his letter would be meaningless, for "political" in its technical sense refers to general matters of government and as to such matters of course the Association may and should express itself.

In the partisan sense of "political" Mr. Robertson's caveat as to the "Bricker" Amendment is not supported by the record. At no time has it been involved in partisan politics. The complete proof of this statement is found in the history of the Amendment.

When S. J. Res.1. was introduced it was sponsored by sixty-four Senators, nineteen Democrats, and forty-five Republicans. In amended form it was favorably reported out by the Senate Judiciary Committee originally by a vote of eight to four which later became ten to five. Out of fifteen members of this Committee eight were Republicans and seven were Democrats—six Republicans and four

(*Continued on page 154*)

Antitrust Developments:

A New Era for Competitive Pricing

by **Thomas E. Sunderland** · *of the Illinois Bar (Chicago)*

■ **This article is an expansion of an address before the Section of Antitrust Law of the Illinois State Bar Association which Mr. Sunderland delivered at Chicago on December 4, 1953. Certain developments since that time, which are analyzed in this article, lead the author to conclude that trends that were straws in the wind in 1953 have now changed the climate in which business operates to make possible a freer and more effective competition.**

■ Attorneys studying a client's pricing problems often must decide whether a buying or selling price or practice is or is not lawful under the various antitrust laws. All too often lawyers have attempted to chart a course between Scylla and Charybdis—between conduct violating the Sherman Act[1] and that contrary to the Robinson-Patman Act[2]—with the uneasy feeling that perhaps the client would be violating some law regardless of what he did. Inasmuch as the conflict between these two laws has been discussed elsewhere,[3] only a few aspects of this subject need be mentioned here as background for an appraisal of several new developments which indicate that a more reasonable interpretation of the antitrust laws is in the making.

The foundation of our entire structure of antitrust laws is the Sherman Act. It has a fundamental philosophy with which most lawyers, economists and businessmen agree. That philosophy, acknowledging the highly beneficial effects of free and fair competition, assigns to the Government primary responsibility for eliminating unreasonable restraints and monopoly so that competition in the market place will control prices and pricing practices.

The Robinson-Patman Act, as interpreted in the past by the Federal Trade Commission and by the courts, is hardly an antitrust law at all. Its import is in the opposite direction—toward the suppression of competition, and a negation of the idea that competition in the market place is a proper regulator of pricing practices.[4] Hence the confusion in which businessmen and their lawyers find themselves.[5]

It is my thesis here that the Sherman and Robinson-Patman Acts need not be entirely at cross purposes with each other. Second, recent developments show a new decisional trend, whereby some of the major conflicts between the two laws are being resolved in favor of freer and more effective competition.

Illegality Per Se . . . *Or the Rule of Reason?*

Much of the difficulty in the past has resulted from a tendency to apply a type of *per se* illegality in connection with the Robinson-Patman Act. *Any* price discrimination is likely to be deemed illegal.[6] Because the doctrine of "illegality *per se*" in antitrust liti-

1. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1946).
2. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1946).
3. Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ANTITRUST LAW SECTION REPORT 60 (ABA 1952); Morton and Cotton, *Robinson-Patman Act—Anti-Trust or Anti-Consumer?*, 37 MINN. L. REV. 227 (1953); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1198, *et seq.* (1952); Rowe, *Price Discrimination*, 60 YALE L. J. 929 (1951).
4. Oppenheim, *Needed Revisions in National Antitrust Policy*, CCH ANTITRUST LAW SYMPOSIUM 70 (1953); Austern, *Some Observations on the Robinson-Patman Act*, CCH ANTITRUST LAW SYMPOSIUM 105 (1953); H. W. Austin, *The Robinson-Patman Act—Is It in the Public Interest?*, ANTITRUST LAW SECTION REPORT 92 (ABA 1952); Simon, *Legal Price Fixing*, CCH BUSINESS PRACTICES SYMPOSIUM 83 (1951). See also *Sugar Institute* v. *United States*, 297 U. S. 553 (1936).
5. "The fundamental philosophy underlying the anti-price discrimination section of the Robinson-Patman Act can not, in my judgment, be reconciled with the Sherman Act, and I think it should be recognized for what it is: namely, an exception to the Sherman and Clayton Acts similar to the Miller-Tydings Act." McCracken, *The Federal Antitrust Laws from the Viewpoint of a Business Lawyer*, CCH ANTITRUST LAW SYMPOSIUM 85, 90 (1953). See also Berger and Goldstein, *Meeting Competition Under the Robinson-Patman Act*, 44 ILL. L. REV. 315, 318-325 (1949); Austern, *Inconsistencies in the Law*, CCH BUSINESS PRACTICES SYMPOSIUM 158 (1951). One facet of the Act has been aptly summarized: "Regardless of whether the marginal retailer competitor's need for legislative support ever served as valid justification for the passage of such an act, Robinson-Patman has proved to be clearly against the interest of the consumer." Morton and Cotton, *Robinson-Patman Act—Anti-Trust or Anti-Consumer?*, 37 MINN. L. REV. 227, 245 (1953).
6. "[V]iolation is established merely by showing two different prices to competing purchasers—with all else being presumed." Austern, *Some Observations on The Robinson-Patman Act*, CCH ANTITRUST LAW SYMPOSIUM 105, 113 (1953). See also C. Austin, *Price Discrimination*, 43, 48-9, 89 (A.L.I. 1952); and footnotes 34 and 39 *infra*.

gation originally developed in other contexts, it is necessary to review briefly the genesis and application of this doctrine. Likewise, the contrasting "rule of reason" must be considered for background purposes.

"Illegality *per se*" signifies that certain types of competitive conduct are unlawful in and of themselves. They are automatically illegal, even though the evidence would show that competition was not adversely affected or that the purposes of the law were in no way thwarted. A conclusive presumption of illegality flows from the mere proof that the practice exists and evidence showing that there was no injury to competition is inadmissible.

The classic illustration of *per se* illegality is price fixing under the Sherman Act. According to the Supreme Court in *United States* v. *Socony-Vacuum Oil Company* ". . . price-fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."[7] Similarly the joint refusal of competitors to deal with a designated buyer or seller has been conclusively presumed to be an illegal boycott.[8] And where patents are used to obtain monopolies on unpatented articles, illegality *per se* prevails.[9]

The "rule of reason" suggests a diametrically opposite approach.[10] Under this "rule" the tribunal hearing the case must consider all the factors and circumstances in the situation to determine whether or not the policy of the law has been infringed.[11]

The Rule of Reason . . . *Three Well-known Cases*

Since the initial formulation of the Sherman Act "rule of reason" by the Supreme Court in 1911 it has been repeatedly followed. Three well-known cases are adequate for our present purposes to show the scope of this rule. Thus, in the old *Window Glass Manufacturers* case[12] an agreement among competing hand-blown glass manufacturers and a labor union to share the available labor force resulted in limiting the operations of competing factories. This seeming clear-cut conspiracy in restraint of trade was, however, only part of the picture. Other factors were present: Hand-blown glass had to meet the competition of machine-made glass which could be produced for half the cost of the hand-blown product; the hand-blown manufacturers were struggling to survive—there was insufficient skilled labor to go around. A consideration of all the facts convinced Mr. Justice Holmes and the Court that the agreement could cause no harm to the public but would allow a dying industry to survive for a time.

In *Chicago Board of Trade*[13] a rule of the Board required that certain transactions entered into after the close of trading hours be made at prices which prevailed at the close. The rule was designed to require the trading in question to be carried on at prices arrived at in open bidding on the Board. The admitted restraint, the Court concluded in an opinion by Justice Brandeis, was not unreasonable when considered in the light of the over-all operations of the Board. In a third example, *Appalachian Coals,*[14] an exclusive-selling agency representing numerous otherwise independent and competing producers of bituminous coal was held, in an opinion by Chief Justice Hughes, not to be an unreasonable restraint on competition in the light of the depressed conditions prevailing in the early 1930's in the coal industry.

In each of these three instances there was an admitted restraint on competition, one which superficially appeared to conflict with the mandate of the Sherman Act and which would be clearly illegal under a *"per se"* rule. But a consideration of all of the surrounding circumstances, under a "rule of reason", showed no harm to the public interest, hence no illegality.

Per Se Illegality . . . *A Strange Phenomenon*

In the realm of the Clayton Act, courts have occasionally borrowed *"per se* illegality" from Sherman law contexts to find automatic injury to competition, and therefore infractions of the law, from the mere existence of a particular practice. Yet the various sections of the Clayton Act proscribe certain conduct only where there has been, or probably will be, an adverse effect on competition. The frequent presence of "rule of reason" language in the statutory language of the Clayton Act makes the use of *"per se* illegality" in its interpretation a strange judicial phenomenon.

The *per se* doctrine has made its mark in the sensitive and important areas covered by Section 3 of the Clayton Act[15] which deals with tying clauses and exclusive dealing arrangements. *International Salt,*[16] brought under both the Sherman Act, Section 1, and the Clayton Act, Section 3, teaches that tie-ins between patented machines and the material to be used therein constitute a *per se* violation of both statutes.[17] Yet the statutory prohibition of these sales is not absolute—the Clayton Act makes tie-in sales illegal only "where the effect . . . may be to

7. 310 U.S. 150, 218 (1940). See also *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).

8. *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941). For another type of boycott held to be *per se* illegal, see *Associated Press* v. *United States*, 326 U.S. 1 (1945).

9. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661 (1944).

10. Perhaps Mr. Justice Brandeis best defined the "rule of reason": "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

11. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179-180 (1911).

12. *National Association of Window Glass Manufacturers* v. *United States*, 263 U.S. 403 (1923).

13. *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).

14. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933).

15. 38 Stat. 730 (1914); 15 U.S.C. §14 (1946).

16. *International Salt Co.* v. *United States*, 332 U.S. 392 (1947).

17. Referring to *International Salt*: "It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by [the] defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition." *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305 (1949).

substantially lessen competition or tend to create a monopoly. . . ."

Exclusive dealing arrangements are contrary to Section 3 as sales or contracts for sale on the condition that the purchaser shall not deal in the goods of a competitor of the seller where (and only where) the requisite adverse effect on competition specified in the language quoted above is present. In this context the *Standard of California* case[18] probably represents the high water mark of *per se* illegality. The majority opinion of Mr. Justice Frankfurter construed the effect-on-competition language as *not* requiring proof that competition was actually threatened or that there had been detriment to the public interest. Despite absence of proof to support the conclusion, the Justice assumes that "Standard's use of the contracts [with independent service stations covering their requirements of gasoline and, in some cases, other products] creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity."[19] Viewed by the Court, the only issue was whether a substantial amount of commerce was involved—in that case less than 7 per cent of the business was sufficient for an affirmative answer.[20] As has been observed, *per se* illegality makes little sense in an exclusive dealing case.[21] In many, if not in most, situations exclusive dealing has, and can have, no perceptible adverse effect on competition. For many thousands of items offered for sale, the number of available and potential dealer and jobber outlets is not restricted. So long as other sellers are not denied access to the market, the public is little harmed, if at all, when a seller chooses to distribute through a reseller who agrees to concentrate on the seller's line of products. And the arrangement may be highly beneficial to both seller and dealer—through dealer training programs, the supplying and utilization of selling aids, the stocking of a full line of original equipment and of supplementary and repair parts, and in numerous other ways, seller and exclusive dealer compose a vigorous competitive team. On the other hand, a non-exclusive dealer, instead of pushing a given line, probably will let a customer select any one of several competing items in his place of business; this has the inevitable effect of giving an advantage to the merchandise of the supplier who can afford the most national advertising. The smaller the supplier the smaller is his advertising budget and the more he depends on his dealers to push his products. The use of exclusive dealing contracts is, probably in the majority of instances, one method of competing. Arbitrarily to bar sellers from utilizing available methods of competing in itself restrains competition.[22]

The Richfield Case . . . *A Significant Development*

The far-reaching implications of *Standard of California* in holding exclusive dealing contracts illegal *per se* was startling to the Bar generally. The *Richfield* case[23] presented a variation of the *Standard of California* situation and followed the ruling in the former case—but the decision contains a significant development: a majority of four out of the seven participating Supreme Court Justices stated that they disagreed with *Standard of California*, but felt themselves bound by the precedent so recently established. This development was worth noting; *Richfield* indicated that the *Standard of California* ruling might be limited to its particular facts.

This indication found solid support in the later *Motion Picture Advertising* case[24] in which the majority of the Court upheld one year exclusive dealing contracts. Moreover, Justice Frankfurter in a dissent construed his own *Standard of California* opinion in such a way as to minimize the significance of *per se* illegality. He seemed to suggest that vari-

Fabian Bachrach

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18. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949).

19. 337 U.S. at 314.

20. The 6.7 per cent of the gasoline business in the area involved represented in excess of 57 million dollars of gasoline sales in one year, 337 U.S. at 295, 305, "As a practical matter, in any but the most minuscule enterprise, an exclusive selling commitment by a dealer may be considered illegal." Austern, *Inconsistencies in the Law*, CCH Business Practices Symposium 158, 161 (1951).

21. "Under Section 3, the introduction of a *per se* test in the *Standard Oil of California* case runs directly counter to the 1914 purposes and to business practices of today that are economically beneficial and promotive of competition," McAllister, *Where the Effect May Be To Substantially Lessen Competition or Tend To Create a Monopoly*, Antitrust Law Section Report 125, 147 (A.B.A. August 1953). See also Chaffetz, *The Antitrust Laws and Small Business*, Antitrust Law Section Report 77, 84-89 (A.B.A. April 1953); Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 Harv. L. Rev. 913, 933-40 (1952); Austern, *The Standard Oil of California Decision*, CCH Antitrust Law Symposium 43 (1950).

22. Justice Jackson, dissenting in *Standard of California*, was sorely troubled on this point: "I am not convinced that the requirements contract as here used is a device for suppressing competition instead of a device for waging competition. . . . [T]he retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. It means to me, if I must decide without evidence, that these contracts are an almost necessary means to maintain this all-important competition for consumer business, in which it is admitted competition is keen. The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged." *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 at 323 (1949). Commissioner Mason recently commented on the desirability of allowing small businesses attempting to break into a new market to utilize exclusive dealing arrangements as a means of doing so. *Harley-Davidson Motor Co.*, F.T.C. Docket 5698, CCH Trade Reg. Rep., Par. 25,108 (1954).

23. *Richfield Oil Corp.* v. *United States*, 343 U.S. 922 (1952).

24. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

ous economic and marketing factors in *Standard of California* were important to and apparently determinative in that decision.[25]

A landmark step in the retreat away from *per se* illegality in the realm of exclusive dealing is the Federal Trade Commission action in *Maico Company*,[26] where an initial decision of a hearing examiner that exclusive dealing contracts automatically violated Section 3 was reversed by the Commission. The examiner had rejected all evidence relating to the actual competitive effect upon the hearing-aid industry of the company's exclusive dealing requirements—such evidence was directed to an increase in the number of the company's competitors, to the volume of business of such competitors, to a declining share of the market enjoyed by the company and to other matters relating to the competitive picture. In a unanimous decision[27] the Commission said ". . . we cannot conclude that evidence of the effect of an exclusive dealing agreement on competition is immaterial in a Federal Trade Commission proceeding. . . ."[28] Referring to the Supreme Court's repeated allusions to the expertise of the Commission in relation to the business and economic conditions of industries under examination and to the Court's statements that judges were unequipped to treat such problems, and recognizing that "only those exclusive dealing agreements which are lessening or which if allowed to continue will probably lessen competition or tend to create a monopoly"[29] are illegal, the Commission stated that it was its *duty* to weigh *all* of the relevant factors.

A new trend is developing. It is unquestionably correct to say that today an exclusive dealing contract is not illegal *per se*.* Initially the Commission and, secondly, the reviewing court, as in *Motion Picture Advertising*, will look to the competitive and economic picture—to the market position of the party having the exclusive dealing contracts, to the opportunities for entry into the business for newcomers, to the number of competitive outlets that are available, and to the likely effect on competitors—to determine if there is or is likely to be any real adverse effect on competition. In short, a "rule of reason" approach may be expected in the future.

This is the only course fully consistent with the statutory language outlawing exclusive contracts only "where the effect . . . may be to substantially lessen competition". Even though the presentation of the Government's case may be more difficult and the trial may take more of the Commission's or court's time, this is a small price to pay for realistic antitrust enforcement. Certainly the public interest is not best served by the mere numbers of prosecutions brought or of victories achieved by the Government, if most cases involve matters little affecting the public interest and if most Government victories do not achieve freer, fairer and more effective competition. Unless the competitive method under attack is actually unfair or unreasonable, the purpose of the law is affirmatively defeated when the method of competition is restricted.

In this connection the recent *Investment Bankers*[30] case is significant. It had been generally thought that the *Socony-Vacuum*[31] doctrine must be taken at face value, that any agreement among competitors fixing or affecting prices was illegal *per se*. But Judge Medina in *Investment Bankers* did not feel himself bound by any such arbitrary rule. When the Government had failed to prove the comprehensive illegal conspiracy which had been alleged, it fell back on a charge that the agreement by members of an issuing syndicate on the offering price of securities was price fixing and therefore automatically illegal. Judge Medina's rejection of this theory was unequivocal: " . . . I find nothing in any of [the decided] cases which can be regarded as controlling precedent here or which binds me to hold the clauses of these syndicate agreements now under attack to be illegal *per se* under the Sherman Act."[32]

In effect Judge Medina followed in the steps of Justice Holmes in *Window Glass Manufacturers*, of Justice Brandeis in the *Board of Trade* case, and of Chief Justice Hughes in *Appalachian Coals*. When the peculiar facts of the particular case made application of the *per se* doctrine inappropriate he applied a "rule of reason".[33]

Injury to Competition . . . *The Robinson-Patman Act*

During the years when an increasing number of other practices were being held illegal *per se* the granting of price differentials also came to be considered automatically illegal under the Robinson-Patman Act, at least where the difference in price

(Continued on page 185)

*After this article was set in type, a startling opinion by Judge Medina ruled that this exclusive dealing was illegal *per se*. [See letter by Mr. Sunderland at page 154 of this issue of the JOURNAL].

25. *Id.* at 402-3. See McAllister, *Where the Effect May Be To Substantially Lessen Competition or Tend To Create a Monopoly*, ANTITRUST LAW SECTION REPORT 125 (A.B.A. August, 1953).

26. *The Maico Company, Inc.*, F.T.C. Docket 5822, CCH Trade Reg. Rep., Par. 11,577 (1953).

27. Commissioner Mead concurred in the result; Commissioner Gwynne did not participate.

28. *Supra* note 26.

29. *Id.* Relying on the *Maico* decision, the Commission subsequently remanded two exclusive dealing cases to hearing examiners for consideration of further evidence concerning the competitive effects of the practice. *Outboard, Marine & Mfg. Co.* and *Beltone Hearing Aid Co.*, F.T.C. Dockets 5825, 5882, CCH Trade Reg. Rep., Par. 11,657 (1954). The same action was recently taken in a case involving alleged "tie-in" sales of propane gas and appliances, *Insto-Gas Corp.*, F.T.C. Docket 5851, CCH Trade Reg. Rep., Par. 25,188. For a recent exclusive dealing case in which respondent failed to meet "rule of reason" tests, see *Harley-Davidson Motor Co.*, *supra*, note 22.

30. *United States* v. *Morgan*, 118 F. Supp. 621 (S.D. N.Y. 1953).

31. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

32. *Supra* note 30, page 689.

33. "Through the general concept of reasonableness, the antitrust laws have been a means whereby rules of law have been imposed, industry by industry and business institution by business institution, to preserve the foundations of the market system and thereby to permit the identity of public purpose and institutional conduct." Carlston, *Role of the Antitrust Laws in the Democratic State*, 47 N.W. U. L. REV. 587, 604 (1952).

The Federal Trade Commission recently applied the "rule of reason" in determining the legality of an arrangement between twenty-seven wholesale distributors of greeting cards to pool their combined purchasing power and obtain favorable prices on the cards. Noting that respondents' total annual sales were $3,000,000, out of an industry total of $250,000,000, the Commission found, ". . . this appears to be an instance in which a few small concerns have joined together as buyers in a non-collusive effort to wage competition, not to restrict it." *Associated Greeting Card Distributors of America*, F.T.C. Dkt. 5983, CCH Trade Reg. Rep., Par. 11,624.

Standards for Bar Examiners:

The Time Has Come for Substantial Reform

by **Homer D. Crotty** · *of the California Bar (Los Angeles)*

▪ Reform of our system of bar examinations has moved with "the slow and erratic amble of a tortoise", Mr. Crotty declares, in spite of the efforts of the National Conference of Bar Examiners and the Section of Legal Education and Admissions to the Bar. In some states, law students are still admitted to the Bar on the diploma privilege; others admit members of the Armed Forces without an examination on the theory that nothing is too good for our "boys in uniform". Mr. Crotty's article is a catalogue of the defects in our present system and a statement of what ought to be done about it. This article is taken from an address delivered before the National Conference of Bar Examiners, meeting in Chicago last August.

▪ During the past few years we have seen the first great survey of the American Bar. This survey was also the first comprehensive one of our legal education and bar examinations, and an immense sum of money was expended for it. The part of the Survey dealing with bar examinations and admissions to the Bar was compiled by our colleague, James E. Brenner, Professor of Law at Stanford University, who acted as the consultant for the Survey. It will be referred to as the Brenner Report. Many of the views which you will find in the Brenner report have been advocated by speaker after speaker, year after year, in the annual meetings of the National Conference of Bar Examiners and of our Section of Legal Education; many, indeed, have been published in the journals which are freely and widely circulated among the members of the Bar. Yet the progress of reform has moved with the slow and erratic amble of a tortoise. Some new approach, I am convinced, must be made if we ever are to accomplish substantial reforms in bar examinations. It is time to implement the recommendations of the Survey.

A story which I heard at the last meeting in Washington of the American Law Institute may be apposite here.

As a part of his benefits under the G. I. Bill of Rights, a veteran acquired two fine and powerful mules. He hitched them to his wagon, but they refused to budge no matter how hard he urged them. He applied to the Veterans' Bureau for help and was told that as a part of his G. I. benefits he could have the services of a mule trainer. Then he took the mule trainer out to the farm. The mules were again hitched to the wagon with the same result—not a move. At this point the trainer took off the whiffletree and began beating the mules over the head with it. The G. I. cried, "Good Lord, man, you'll kill them." The trainer replied, "Not at all, my boy, the first thing you've got to learn when you train mules is to get their attention."

Let us ask, what is the real purpose of admissions to the Bar? Why are we genuinely concerned with the subject at all? Are we to head back to the views of the Jacksonian period and admit anyone to practice? I am sure that all Bar Examiners would exclaim at once that our unshakable purpose is to admit only those who are learned in the law and those who are completely trustworthy. To suggest any other purpose would be decried as absurd. Is not the emphatic aim to admit only those who can be trusted to render legal services to the public of a superior character and better than any other profession or calling? Yet what actually happens? Let me list a few complaints.

Diploma Privileges . . . *A Continuing Problem*

For some decades, the American Bar Association has been on record against the admission of lawyers upon motion without a bar examination. This recommendation has been accepted by most jurisdictions, for it is well recognized that unless their law graduates are put to an impartial test of their legal learning, the tend-

ency of law schools is to relax in their instruction and to graduate some men at least whom they would never risk to take an impartial bar examination.

What, however, are the facts? In some states the number of brave souls who take and pass the bar examination is substantially less than the number who are admitted on the diploma privilege. In 1953, for example, in Alabama and Louisiana, more than four times as many were admitted by the diploma route as passed the bar examination; nearly six times as many were admitted in Florida, and about ten times as many in Wisconsin. Florida has now abolished the diploma privilege and its law school graduates must measure up to the same impartial test as other candidates for admission. The diploma privilege should be abolished in all jurisdictions.

Next we come to the thorny and emotionally charged subjects of the admission of veterans on motion and of giving veterans privileges in bar admissions not available to non-veterans. In several states there are special privileges granted to veterans on admission to the Bar that the courts and legislatures would never allow with respect to admission to any other profession. Imagine a medical doctor or a dentist veteran being admitted without an examination to test his fitness! Try to find a case where he is given credit of several points in his examination where a non-veteran examinee gets no such privilege. These unsound measures are all based upon the theory that the courts and the legislatures are doing something for the boys who fought so hard for this country. Military service, as all of us know, can vary from grueling action in combat to sitting before a desk in an air-conditioned room in the Pentagon. Usually these veteran relaxations are said to be general in character. In practice, we meet the most cynical exceptions. In my own state, one of our judges spent a substantial amount of time at the legislature to lobby a veterans' exemption designed, he said, to help the boys, but in reality tailor-made to admit his own son without examination. The boy who takes advantage of these alleged benefits will go through life with a lingering doubt as to whether he really could have passed the examination. Veterans who have been admitted by this easy route have been massacred in practice at the hands of those who came in the hard way. As one judge has put it, "They are somewhat like an amateur prizefighter who has no defense against a boxer—they don't know what to expect or what hit them."

Suggestions for the remedying of this inequality in actual law practice between the man who passed the bar examination and the non-examined veteran were made ironically by one author, who said:

> If the veteran, including the merchant seaman (and perhaps in time the longshoreman, the shipyard worker, the air raid warden and the blood donor), who is admitted to the bar without taking an examination, is going to be handicapped in competition with the members of the bar who have passed an examination, let the legislature do something about *that*. There are many things it can do to rectify this incipient inequity.

Among other things consider these:

> 1. In all civil jury cases in the state courts he shall be entitled to a verdict by a 7 to 5 vote rather than the usual 9 to 3. Or the same thing might be arrived at in another way by providing that he be given a veteran's preference of 2 jurors. In the federal courts, where the rule of unanimity prevails, the Judicial Code might be amended to provide that a vote of 10 to 2 in his favor shall be deemed to be unanimous. Of course, this might raise a constitutional question under the Seventh Amendment, but let's not cross that bridge until we have to.
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> 3. Wherever the law accords a specified number of peremptory challenges, the non-examined lawyer shall have one additional peremptory challenge for every year of service in the armed forces, the longshoreman's union, etc.
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> • • •
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> 9. Amend Article XX, Section 9, of the state constitution to provide that no will or trust drawn by an unexamined lawyer shall be deemed to violate the rule against perpetuities unless it's a particularly bad violation.[1]

But enough of irony! These varieties of special privileges for veterans should be abolished. The courts and legislators, as well as the bar examiners, should ask themselves whether their duty should not be to admit only men who can be depended upon to render adequate legal services to the public. Is not the public entitled to the assurance that each lawyer admitted is qualified?

It may seem that I have spent a good deal of space on this point. But we should keep in mind that during 1953, of all of the admissions to the Bar throughout the country, nearly 12 per cent were admitted without examination either because of the diploma privilege or because of the veteran privilege.

As serious as these matters are, there are more serious complaints. The judges complain that their work is made vastly more difficult by the numbers of ill-trained and ill-prepared lawyers who practice in the courts today.

One judge commented:

> In jury cases the court must be most careful and frequently there is little the court can do to see that justice is done, when he sees what appears to be a good case miserably handled, due to the incompetence of the attorney for one of the parties, to the great detriment of the client.

Better-Prepared Lawyers . . . *Less of the "Law's Delay"*

Judges the country over have suffered silently from the rebukes of the press over court congestion, trials delayed for years and over the ever-increasing expenses of litigation. Is the fault altogether theirs? Many of the judges are confident that the courts' burdens would be cut amazingly if only competent and well-prepared lawyers were practicing before them. The number of judges needed to handle the volume of judicial business could be reduced substantially as indeed, numbers of ill-founded suits would never be brought. Is it any wonder that we have an increasing public clamor for more and more administrative tri-

1. Harnagel, *Some Suggestions in Aid of the Unexamined Lawyer*. 26 Los Angeles Bar Bull. 328, 342, 343.

bunals to handle legal work? Is it also any wonder that the problems of unlawful practice increase rather than diminish from year to year?

The Bar Examiners are the guardians at the gate. They should have a resolute devotion to their duties as bar examiners—to admit only the competent and the trustworthy. If they do not discharge this duty the profession is damaged immeasurably.

It is my belief that bar admissions should be controlled solely by the higher courts of our states and that admission procedures should be removed from the hands of the state legislatures. It is also my belief that the higher courts' budgets should include an adequate amount of money to handle bar examinations properly and to employ an adequate staff. There should at least be a full time secretary in all cases where the number of applicants warrants it. If the number of applicants is very small, a part of the salary should be paid by the Committee of Bar Examiners to the person who performs the duties of the secretary. In this way, the Committee will know its work will not be handled on a hit-or-miss basis.

If the number of applicants is large enough, the fees received will be sufficient for an adequate staff. But where the fees are too small or the amounts raised inadequate, the court's own budget should supply the deficiency. The fees paid by applicants for admission in most jurisdictions of this country today are so inadequate as not nearly to meet the costs of administering bar examinations. Notwithstanding inflation, the fees of $10 or $25 or $30 per applicant continue year after year. The job should not be assigned as a part time matter to the court's clerk, who doubtless has plenty of duties to fill his entire time. A staff whose sole duty it is to administer bar examinations and admissions is vitally necessary. An adequate staff will remedy many of the evils about which the courts and public complain.

We have come to the time, I believe, when standards for bar examiners should be adopted by the American Bar Association. These standards will not have any sanction to enforce them, except the sanction of public opinion. We should aim in these standards to persuade courts and bar examiners throughout the country to break away from the inadequate and often antiquated practices which have existed so long. In making this statement, I do not want to detract from the good work now being done in a number of places. Many states today already have procedures for bar examiners and bar examinations which exceed in excellence the minimum standards which I propose.

Standards must be designed to accomplish two principal objects: *first*, bar examiners should admit to practice only those who are competent—those who pass an adequate bar examination designed to test learning and fitness; and *second*, bar examiners must admit only those whose character is above reproach and who have an ingrained sense of trusteeship.

In selecting bar examiners, the appointing agency is faced with many considerations. First and foremost, each examiner must be a person of integrity and ability; he must not be a political appointee; he must not owe his appointment alone to friendship with the appointing powers. Each examiner must be above reproach, and cannot have even the slightest suspicion attached to him that he is under obligation to the appointing authority, so as to imply that his moral judgments can be swayed by friendship or considerations of a political nature. Neither should he be appointed because he comes from a particular law school and, indeed, no trustee or director or dean of a law school or of any university with which such law school is affiliated should ever be appointed. Nor can he have it said about him that he must decide whether his allegiance is to his law school or to the examining committee.

Each appointee should have a thorough acquaintance with the

Homer D. Crotty practices in Los Angeles. He is a former Chairman of the Committee of Bar Examiners of the California State Bar and a past president of the State Bar of California. He received his A.B. in 1920 and his J.D. from the University of California in 1922, and his LL.M. from Harvard in 1923.

methods and problems of modern legal education. He should manifest a present and constructive interest not alone in admissions to the Bar but in legal education as well. In legal education, as in other fields there is constant progress and change, and bar examiners should be distinctly and currently aware of these changes.

The man who is appointed as a bar examiner should be devoted to his work and should be prepared to give whatever time is necessary to this important function.

Each appointee should have a profound appreciation of the necessity of selecting only those applicants for admission to the Bar who are completely trustworthy. The minimum standards should require that only those applicants for admission should become lawyers who in practice can serve as trustees. The bar examiner must be prepared to eliminate those in whom any defect of character has become apparent from his application or from the records which he supplies with it. In those states which have adopted the necessary precaution of taking fingerprints

of the applicants there have been a number of astonishing discoveries of the criminal records of some men who apply. Naturally most of these offenses involve misdemeanors or criminal actions of a petty nature, but where the record discloses larceny or embezzlement, forging of checks or other serious crimes, there can be little excuse for letting the man take the bar examination.

Character Investigation . . . *We Have Been Too Lenient*

Fingerprinting of applicants is essential. At the present day, with a highly mobile people in this country, the bar examiners of necessity will know very little about most of the men who appear before them. Indeed, in some cases, it is doubtful whether they will know any of the applicants at all. Fingerprinting is now required in California, Florida, Michigan and New Jersey, and in one of the judicial districts of New York. There surely ought not to be any objection to fingerprinting at this day. It is widely required for drivers' licenses. During the war, the manufacturing industries engaged in war production required it.

Every questionable character who gets into the Bar makes it unpleasant and difficult for the entire Bar. The public does not discriminate, and if a crook appears among the lawyers, the public immediately concludes that all lawyers are crooks. It has been frequently said that it is difficult to determine whether a boy has really formed a good or bad character before he has graduated from law school. The general average age at graduation is around twenty-four. It is interesting to note that persons under twenty-one last year represented 50 per cent of the arrests for crime against property—that is, robbery, burglary, larceny, auto theft, embezzlement and fraud, buying and receiving stolen property, forgery and counterfeiting. The FBI Uniform Crime Reports show that persons under twenty-five were responsible for 75 per cent of the arrests for burglary, 60 per cent of the arrests for theft and 80 per cent for auto thefts, and over 40 per cent for violations of the Narcotics Drug Laws.[2] These figures would seem to indicate that character formation may indeed be well advanced by the time an applicant is twenty-four. I submit that a more intensive investigation of the character of applicants for bar examinations is urgently needed. Too little character investigation is the rule, rather than too much.

It seems to me that the courts have been too lenient on this matter. Let me refer to the recent case of *In re Hyra*, 104 A. 2d 609, where the Supreme Court of New Jersey, in a divided opinion, refused to disbar a man who had lied on his application for admission. The court suspended him for two years. The question had been asked him, "Have you ever been concerned as a party plaintiff or defendant or witness in a legal proceeding? If so, state fully the court, administrative office or tribunal, the character of proceedings, and your relation to it." The applicant answered "No." Later it was brought out that he had been convicted on five allegations of burglary and larceny, but sentence had been suspended and he was placed on probation.

There was a strong dissenting opinion by Mr. Chief Justice Vanderbilt, who pointed out that when Hyra was asked, after he was found out, why he had not answered the question correctly at the first time, he stated, "Frankly, I don't believe I was ever asked directly by any of these character committees whether I did have a criminal record."

In a case in California a number of years ago, *State Bar* v. *Hull*, 103 Cal. App. 302, the applicant also failed to reveal the fact that he had served eighteen months in Ft. Leavenworth for fraud in violating the federal banking statutes. His answer was that he did not believe the crime involved any moral turpitude. The court, however, in that case, disbarred him.

The question arises as to just how much mendacity the courts will permit an applicant to indulge in. If the courts do not insist upon a high standard of character for lawyers and are prepared to condone or to punish lightly numerous deflections from the course of right conduct, the public relations not only of the Bar but of the courts as well will be damaged. I submit that the question which the courts should answer is not whether the applicant is entitled to the benefit of the doubt, but whether the client and the public are.

The bar examiners should also make adequate inquiry of each applicant as to his loyalty to his country. This subject appears to be widely overlooked or ignored, though the need for investigation is pressing.

Every bar examiner should have such an outstanding professional reputation that there can be no question about his qualifications to become an able and efficient committeeman. He should have sufficient scholarly attainments to qualify him to prepare adequate and searching bar examination questions. It is true, however, that, only in a few instances will a bar examiner be found expert enough in all the subjects covered by questions in the bar examinations to qualify as a general expert. The answer to this problem may be the adoption of the California system of getting bar examination questions from law professors, or the calling upon the National Conference of Bar Examiners for them, or ultimately a standard National Bar Examination.

There should be rotation among the examiners. There are naturally very great differences in the point of view of lawyers in general and bar examiners are no exception in this respect. It is not either to be expected or hoped for that the point of view of all bar examiners will be unanimous on particular points. Extremists in one direction or the other affect the thinking of bar examiners and the content of the examination. It is therefore important that there should be rotation in bar examiners. Each man should be appointed for a period long enough to gain

(Continued on page 183)

2. 24 Uniform Crime Reports for the United States 111.

Two Significant Decisions:

Ex parte Milligan and *Ex parte McCardle*

by Harold H. Burton · *Associate Justice of the Supreme Court of the United States*

This is the story of a dramatic case and its unique sequel. The story begins in the closing days of the fratricidal War Between the States and it reflects the passions stirred by that bloody conflict. The story ends in the solemn halls of the Supreme Court of the United States and two cases that are landmarks of constitutional law. In Ex parte Milligan, the Court vindicated the power of the regularly constituted courts of the land over a military commission; in Ex parte McCardle, the Achilles' heel of the Court's jurisdiction was uncovered. Mr. Justice Burton presents the dramatic aspects of the two cases in this article taken from addresses delivered before the Iota Theta Law Fraternity at New York City, on September 22, and the Student Law Forum at the University of Virginia, on September 30, 1954.

For this story we turn back the calendar to Monday, March 5, 1866. It is 11 A.M. in the crowded courtroom of the Supreme Court in the Capitol. It is the day set for hearing Case No. 350, *Ex parte Milligan*, with No. 365, *Ex parte Bowles*, and No. 376, *Ex parte Horsey*. The session has just begun. Three attorneys are sworn in as members of the Supreme Court Bar. One of them is among those who will argue for the petitioners in these cases. He is a modest young man of striking appearance, 34 years old, six feet tall, powerfully built, and wearing a full brown beard of the cut then often worn by general officers of the Union Army. He is Representative James A. Garfield, of Ohio, and fifteen years later, almost to the day, he will be sworn in as President of the United States.

The cases reflect the passionate conflict of views between the supporters of Lincoln and the Union on one side, and the "Copperheads" of Indiana and neighboring states on the other. The issues are hot from the flames of war. Petitioners Milligan, Bowles and Horsey are civilian citizens of southern Indiana. A federal military commission has found each of them guilty of conspiring in Indiana, in 1864, against the United States. For this each is serving a life sentence at hard labor.

There is at issue the right of a federal military commission, rather than a civil court and jury, to try such citizens, outside of a combat zone, on charges of subversive acts committed in time of war in a loyal state like Indiana. The case is one of first impression in the Supreme Court. The right of the accused to writs of habeas corpus in order to test the validity of their confinement is also at issue.[1]

In the fall of 1864, each petitioner had been arrested in his Indiana home upon the order of Major General Hovey, commanding the Military District of Indiana. Each was charged with (1) conspiracy against the United States; (2) affording aid and comfort against the authority of the United States; (3) inciting insurrection; (4) disloyal practices; and (5) violation of the laws of war. The supporting specifications described the offenses as having been committed largely through or in connection with secret societies known as the "Order of American Knights" or the "Order of the Sons of Liberty".

Petitioners were tried by a specially constituted military commission consisting of a brigadier general, ten colonels and a lieutenant colonel. The trial opened in the courtroom of the Circuit Court of the United States in Indianapolis.[2] Petitioners were represented by their own counsel and the Government by an army

1. Chief Justice Taney, in his individual capacity, in 1861, held unconstitutional President Lincoln's Proclamation suspending the privilege of the writ of habeas corpus but that case did not reach the Supreme Court. *Ex parte Merryman*, Fed. Cas. No. 9,487. In 1864, the Supreme Court decided that it had no power to review by certiorari the proceedings of a military commission, but it did not pass upon the jurisdiction of the commission to try the case. *Ex parte Vallandigham*, 1 Wall. 243.

2. On the tenth day of its session, the commission withdrew from the room where it had been sitting so that the Circuit Court might hold its regular term there. For the next ten days, the commission occupied the chamber of the Supreme Court of Indiana, but moved from there when the regular term of that court began. Statement by Garfield, quoted in Klaus, AMERICAN TRIALS. EX PARTE: *In the Matter of Lambdin P. Milligan*, 118.

judge advocate. Counsel for petitioners made timely but unsuccessful objection to the jurisdiction of the commission and carefully preserved their right to review that question. Petitioners still contend that, whatever may be the merits of the federal charges against them, they are entitled, under the Constitution of the United States, to jury trials by due process of law in the civil courts.

Harrison H. Dodd, the alleged leader of petitioners, was the first to be put on trial by the commission. However, in the midst of that proceeding, he escaped, at night, from his place of confinement in the Post Office Building and fled to Canada. On October 21, 1864, the commission turned to the instant cases. Twenty-five witnesses were used by the prosecution and thirty-six by the defense. Early in the trial, an official of the "American Knights" and "Sons of Liberty" disclosed that he was a United States detective and that he had kept the government well advised of the proceedings and plans of petitioners. With comparable effect, Heffren, who was one of the alleged conspirators, turned state's evidence and the charges against him were dropped. Following completion of the trial, January 1, 1865, the record was sent to Washington for review.

The commission had found Milligan, Bowles and Horsey guilty of every charge and specification and had sentenced each of them to be hanged.[3] The military authorities had noted concurrence. Lincoln made a preliminary examination of the record and returned it for correction. However, before the corrections had been made, Lincoln was assassinated and, on April 15, Johnson succeeded to the Presidency. On May 2, he approved the death sentences.

The Gallows Erected . . . *The President Intervenes*

The date of execution was set for May 19. The prisoners were placed in irons. The gallows was erected. The efforts to secure a presidential commutation of the sentence, nevertheless, were doubled. Justice Davis, of the Supreme Court, who long had been convinced of the illegality of comparable commission procedure, asked Governor Morton, of Indiana, to intercede. The Governor did so by letter and personal representative. Mrs. Bowles and others also reached the President. Determined to make treason "odious", he was at first adamant, but became conciliatory as the Confederacy collapsed. On May 10, Jefferson Davis was captured. On May 16, President Johnson commuted Horsey's sentence to life imprisonment and gave Milligan and Bowles respite until June 1.

Milligan prepared a speech for delivery on the scaffold. Bowles wrote his wife that there was no hope. But, on May 29, the President issued a proclamation of general amnesty and, on May 30, confidentially ordered a commutation of the sentences of Milligan and Bowles to imprisonment at hard labor for life, the announcement to be made on the date set for the excution. That was done June 2. On June 3, the prisoners were on their way to serve life sentences at the Ohio Penitentiary.[4]

Simultaneously, the litigation now before us had been begun. On May 10, 1865, petitions had been filed in the Federal Circuit Court for the District of Indiana asking for the discharge of Milligan, Bowles and Horsey on the ground of the illegality of their imprisonment by the commission. On May 11, motions for writs of habeas corpus were filed with the same court. That court consisted of Justice David Davis, of the Supreme Court of the United States, sitting as Circuit Justice, and District Judge David McDonald. On May 13, those judges reported themselves to be in opposition to one another in each case on three questions which they certified to the Supreme Court. Those questions, as certified and now pending in the *Milligan* case, are as follows:

I. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?"

II. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

III. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"[5]

While this certificate has postponed the issuance of the writ requested, it has brought with it some important advantages. Assuming that petitioners survive until the questions are answered, the certificate substantially assures a decision by the Supreme Court and it effectively separates the constitutional issues from the emotional handicaps inherent in the offenses.

The parties have agreed, and the Court has ordered, that three counsel may argue for petitioners, three for the Government. One more may then close the case for petitioners. Each counsel is allowed three hours.

We pause here for identification of the Court. Four of its Justices antedate, in service, the Presidency of Lincoln. They occupy the seats nearest the Chief Justice. On his right is Justice Wayne, of Georgia, appointed by Jackson thirty-one years ago and now 76 years old. On the Chief's left is Justice Nelson, of New York, appointed by Tyler twenty-one years ago. On the right of Wayne is Justice Grier, of Pennsylvania, appointed by Polk nineteen years ago. On the left of Nelson is Justice Clifford, of Maine, appointed by Buchanan eight years ago. The remaining five, all appointed by Lincoln, are Justices Swayne, of Ohio; Miller, of Iowa; on the extreme right, Davis, of Illinois; and on the extreme left, Field, of California. Presiding in the center is the latest appointee, Chief Justice

3. A fifth defendant, Andrew Humphreys, was found guilty but, as he had not been active in the matters charged, he was sentenced merely to be confined at hard labor during the war and was released on parole. Klaus, *supra*, at 37-38.

4. Following the trial of petitioners by the commission, the Circuit Court had met in Indianapolis. It was attended, January 2, 1865, by a grand jury which adjourned without returning either an indictment or presentment against any of petitioners. Also, no list of persons held as prisoners by authority of the President of the United States or of his Secretary of State or Secretary of War was furnished to the judges of such court. Accordingly, under the terms of the Act of March 3, 1863, 12 Stat. 755, the imprisoned petitioners apparently became entitled to their discharge upon making proper request for it.

5. *Ex parte Milligan*, 4 Wall. 2, 6.

Chase, of Ohio, who is beginning his second year on the Court.

In view of the impending developments the following additional facts are noteworthy. Justice Davis was brought to the Court by Lincoln from the Illinois state circuit where Lincoln had long practiced. Justice Field came to the Court from the Chief Justiceship of the Supreme Court of California but, before moving to California, he had studied law and practiced in partnership with his older brother, David Dudley Field, of New York, who is the leading counsel for petitioners. Chief Justice Chase came to the Court after wide governmental experience as a Senator from Ohio, Governor of Ohio and Secretary of the Treasury in Lincoln's Cabinet.

The Cases Are Called . . . *The Opening Arguments*

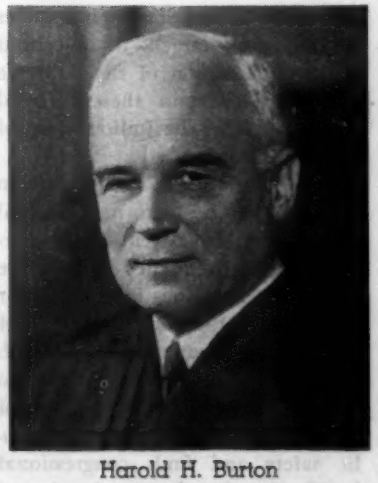
The cases are called. Joseph Ewing McDonald, of Indiana, opens the argument for petitioners. He is a leader of the Indiana Bar. Formerly a member of Congress and the Attorney General of Indiana, he had, in 1864, defeated petitioner Milligan for the Democratic nomination for Governor only to lose the election to Morton. He reviews fully the preliminary proceedings that have produced the present jurisdictional issues.

Next comes James Abram Garfield, of Hiram, Ohio, recently retired as a major general in the Union Army. His distinguished military record and his standing as a Republican Congressman are calculated to dispose of any suggestion that the case for petitioners rests on partisan premises. He is an effective speaker and, before the war, was president of Hiram College. Since 1863, he has served as a Representative from Ohio and he is destined to continue to serve in Congress or in the Presidency until his assassination in 1881. He makes it clear "that the questions now before this court have relation only to constitutional law, and involve neither the guilt or the innocence of the relators, nor the motives and patriotism of the officers who tried and sentenced them".[6]

He describes the situation in Indiana in 1864 as being 200 miles beyond the sound of a hostile gun, an area never entered by a Rebel foot except on a remote border for one day, and a state where the civil courts were open for business as usual. He contrasts this with an imaginary situation placing Lee and his army at one end of Pennsylvania Avenue in Washington, with Grant and his army at the other and approaching the Capitol with roaring guns. In that situation he says: "This court would be silenced by the thunders of war." He analyzes what is meant by martial law and reviews its history. He argues, however, that the mere existence of war and the mere organization of Indiana into a military district is not enough to permit any agency of our Government to substitute military commissions for civil courts and thus deprive civilian citizens of trial by jury and due process of law. He also distinguishes the situation in loyal Indiana from that in a hostile state engaged in rebellion.[7]

Garfield is followed by Jeremiah S. Black, of Pennsylvania. Black is an outstanding leader of the American Bar. He has served on the Supreme Court of Pennsylvania and as Attorney General of the United States. In 1861, he had been nominated by President Buchanan for the Supreme Court and failed of confirmation by a vote of 25 to 26. He served as the official Reporter of the Supreme Court's decisions for its December Terms, 1861 and 1862.

He reviews material history and precedents. He traces colorfully the painful development in England of the right of the individual citizen to a trial by jury and to due process of law, in contrast to a trial by any military tribunal under royal command. He calls for the application of all federal constitutional safeguards to civilians in loyal Indiana in 1864. He distinguishes their situation from that of members of the Armed Forces and that of civilians in occupied territory or in territory within a zone of combat.[8]



Harold H. Burton
Associate Justice of the
Supreme Court of the United States

The case for the Government is opened by its special counsel, General Benjamin Franklin Butler, of Massachusetts. He has but recently resigned from the Army as a major general. He defends the use of military commissions in any state within the military lines of the Union Army and within any theater of military operations. He argues that the fact that civil courts are open is not conclusive that military commissions are unlawful.

After him comes Henry Stanbery, a leader of the Ohio Bar. Next month Stanbery is to be nominated for the Supreme Court, only to have the vacancy abolished by Congress. He will then become Attorney Gen-

6. Klaus, *supra*, at 94.

7. Something of the spirit of the hearing can be gathered from Garfield's following summary:

"Your decision will mark an era in American history. The just and final settlement of this great question will take a high place among the great achievements which have immortalized this decade. It will establish forever this truth, of inestimable value to us and to mankind, that a republic can wield the vast enginery of war without breaking down the safeguards of liberty; can suppress insurrection, and put down rebellion, however formidable, without destroying the bulwarks of law; can, by the might of its armed millions, preserve and defend both nationality and liberty. Victories on the field were of priceless value, for they plucked the life of the republic out of the hands of its enemies; but

'Peace hath her victories
No less renowned than war.'

and if the protection of law shall, by your decision, be extended over every acre of our peaceful territory, you will have rendered the great decision of the century." Klaus, *supra*, at 119.

8. In eulogizing this address, Representative Maish, of Pennsylvania, later said: "Freedom was his client. The great cause of Constitutional Liberty hung upon that single life." Quoted by Clayton in REMINISCENCES OF JEREMIAH SULLIVAN BLACK (1887) 132.

eral of the United States. He confines his argument largely to objections to the jurisdiction of the Supreme Court to entertain these certified questions under the Judiciary Act of April 29, 1802.[9]

The Government's presentation is concluded by Attorney General James Speed, from Kentucky. He argues for the President's right to use military commissions in time of war by virtue of his authority as Chief Executive and commander in chief. He supports the President's right to suspend the privilege of the writ of habeas corpus in the interest of public safety and finds congressional justification for that in the Act of March 3, 1863. He claims that even if the military tribunal in 1864 had no jurisdiction to try petitioners, yet these petitioners may now be held as prisoners of war for aiding, with arms, the enemies of the United States. They may be so held, he contends, until the war ends and then handed over to civil authorities.

March 13, closing the seven days of argument, David Dudley Field, of New York, makes a comprehensive, lucid and exhaustive statement for petitioners. He is at the height of his career as a leader of the American Bar, widely known and highly regarded for his leadership in developing the Legal Code of New York.

He analyzes the issues. He points to the absence of any necessity in Indiana to deny access to civilian courts that are open for business. He emphasizes the fact that the jurisdiction of the commission here at issue rests upon executive rather than congressional authorization. He finds it unnecesary to determine how far the *Congress* lawfully may go in authorizing the use of military commissions.

As to the suspension of the privilege of habeas corpus, he argues that Congress has expressed itself through the Act of March 3, 1863. Under that Act alone, he claims that petitioners are entitled to a writ and to be discharged.

He states the question to be: "Has the President, in time of war, by his own mere will and judgment of the exigency, the power to bring before his military officers any man or woman in the land, to be there subject to trial and punishment, even to death?"[10] He reviews the course of material history and, following his argument, the Court takes the three certified questions under advisement.

The Court's Decision . . .
Judgment for Petitioners

Three weeks later, as the term ends on April 3, the Court answers each question in favor of petitioners.[11] On the facts stated in the petitions and exhibits, it states that writs of habeas corpus should be issued, that the prisoners should be discharged from custody and that the military commission had no jurisdiction to try and to sentence petitioners as it did. The victory of petitioners is complete. The men who, a year ago, walked in the shadow of death are alive and soon to be free.[12]

No dissents are noted to the order of April 3, but the Chief Justice announces that the opinion of the Court will be read at the next term, "when such of the dissenting judges as see fit to do so will state their ground of dissent".[13]

On December 17, 1866, two weeks after the opening of the next term, the Court's opinion is handed down by Justice Davis. It is followed by a separate opinion in which the Chief Justice is joined by Justices Wayne, Swayne and Miller.[14] It is these opinions that have brought fame to *Ex parte Milligan*. It appears from them that petitioners could be discharged on the narrow ground that the Act of March 3, 1863, requires such a discharge where a grand jury meets as one did in Indianapolis in January, 1865, and adjourns without indicting or filing a presentment against federal prisoners held in custody as were these petitioners. However, the Court does not stop there and, inasmuch as three material questions are certified for its determination, the Court can justify answering each, although the answer to the third may not be essential to the termination of the litigation.

Justices Nelson, Grier, Clifford and Field join Justice Davis in the famous opinion of the Court which considers first the jurisdiction of the commission. It treats that issue as the primary one in the case. If, as they hold, the commission had no jurisdiction to try petitioners, then petitioners are being held in custody without authority and are entitled to prompt discharge for that reason. The opinion goes beyond the facts of the case. It states that *not even Congress* can constitutionally give to a military commission the jurisdiction here sought to be exercised. It is with that statement that Chief Justice Chase particularly disagrees. He does not oppose the discharge of petitioners on other grounds. Furthermore, it is not clear that he differs from the majority in holding that, without legislative support, the President's authorization of a military commission to try these charges is inadequate. In any event, the Chief Justice and those joining his opinion do agree with the majority that the writs of habeas corpus should now be issued and that petitioners should now be discharged from custody.[15] The entire Court distinguishes this case from one concerning hostile occupied territory[16] and from one con-

(*Continued on page 176*)

9. 2 Stat. 159.
10. Klaus, *supra*, at 169.
11. 4 Wall. 2, 107, and see 3 Wall. 776.
12. On April 10, at 3 P.M., the warden releases Milligan on a writ of habeas corpus. By 5 P.M., the warden has received word that the President has remitted the sentences and ordered the discharge of all three petitioners. He then releases Bowles and Horsey.
On June 8, 1865, indictments for conspiracy had been filed against Dodd, Milligan, Bowles and other leaders of the Sons of Liberty. However, these are never pressed to trial and, in 1867, they are nolled. Klaus, *supra*, at 42, 44—45.
13. 18 L. Ed. 291.
14. The minutes of the Court state that "Mr. Chief Justice Chase delivered an opinion concurred in by Mr. Justices Wayne, Swayne and Miller dissenting on third question certified."
15. About two years later, Milligan sued Major General Hovey, the members of the commission and others. The case, alleging wrongful arrest and imprisonment, was tried in the Federal Circuit Court for the District of Indiana. Milligan was represented by Senator, later Vice President, T. A. Hendricks, of Indiana. The defendants were represented by Brigadier General, later President, Benjamin Harrison, also of Indiana. Circuit Judge Drummond charged the jury that Milligan was entitled to recover compensatory damages, but only for the imprisonment suffered within two years before the commencement of the action. This left about one month to be considered and the jury awarded Milligan $5. *Milligan* v. *Hovey*, Fed. Cas. No. 9,605, and see Klaus, *supra*, at 45. See also, *McCormick* v. *Humphrey*, 27 Ind. 144.
16. See *Madsen* v. *Kinsella*, 343 U. S. 341.

Federal Judicial Appointments:

The Continuing Struggle for Good Judges

by **Ben R. Miller** • *of the Louisiana Bar (Baton Rouge)*

▪ Mr. Miller's article is not in any way a criticism of the present members of the federal judiciary, but rather a discussion of the continuing problem of maintaining its present high level. It is no secret that appointments to our United States District and Circuit Courts are political. Mr. Miller points out with force that it is rare for either major political party to appoint a member of the opposition to the Bench. The danger in this, he declares, is that the public confidence in the integrity of the judiciary may eventually be undermined. Mr. Miller's article is a summary of conclusions he has reached after several years' experience as a member of the Association's Committee on the Federal Judiciary.

▪ Alexander Hamilton in No. 66 of the *Federalist Papers* said:

> It will be the office of the President to nominate, and with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senators. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice of the President.

Whatever may have been the convention's or Hamilton's interpretation of this "advice and consent of the Senate" clause in Article 2, Section 2, of our Constitution, all lawyers know the Senate has considered this point of view a rather naïve one as to judicial appointments.

For more than five years it has been my privilege to serve on the American Bar Association's Standing Committee on the Federal Judiciary. The names of all those nominated to the District and Circuit Benches or, since the waning period of the Truman Administration when our good friend Ross L. Malone was serving as Deputy Attorney General, all those whom the President proposed to nominate, have been submitted to our Committee. An investigation of each was then made by our Committee—as intense and thorough as the interest and participation of the local attorneys and their local associations would make possible.

From this vantage point and with this experience I should have been derelict in my duties as a member of the Committee if I had not formed some conclusions concerning the actual operation of Article 2, Section 2 of our Constitution—and I should be remiss in my obligation as an American lawyer if I did not attempt to make these known to my fellow lawyers.

First, let me say that based on my own experience while on the committee, and from a penetrating study made by the late Judge Evan A. Evans, Chief Judge of the United States Court of Appeals for the Seventh Circuit, it is evident, to me at least, that both political parties over the past ninety-odd years have considered the federal judiciary as falling in the normal sphere of partisan patronage; and that contrary to Hamilton's assertion, the Senators of the President's own party can and do themselves "choose" appointees to the federal Bench, and are not, or at least do not allow themselves to be, limited to ratifying or rejecting the choice of the President.

That is not to say we have not over the years obtained, and are not now obtaining, good federal judges.

We can well be proud of our federal judiciary over the years. There have been, and now are, men of outstanding qualifications in our federal judiciary system. And it is one of the miracles of America that when placed in positions of great trust and responsibility our men and women rise even above their apparent qualifications.

It is to say, however, that this has been so despite the system of partisanship, of patronage considerations and of senatorial domination of appointments by a President of their own party—not because of it.

The Danger Ahead . . . *Loss of Public Confidence*

The danger is that if the lay public begins to realize these political facts

of life their confidence in our courts may well wane—and it is this solid faith of our citizens in the integrity of our federal courts which alone enables them to fulfill their historic purpose.

Other facets disturb me—so firmly do I believe that continued separation of powers, of checks and balances, among our three branches of government is the cornerstone of our democracy.

As lawyers we know that the physicist's law of the pendulum is true in government. Whenever the pendulum is pulled far to one side it rebounds almost equally far to the other. Only our system of separation of powers and of checks and balances can first of all prevent the violent swinging of the pendulum of government too far to either side.

We know that in our history there have been periods when first one and then the other of the three branches of government sought to usurp power belonging to another. We know, for example, that Presidents Jefferson, Jackson, Lincoln and Franklin D. Roosevelt—rightly or wrongly—complained that the Supreme Court in their day was invading the executive and legislative field. And that in Johnson's and Grant's administrations — and to some degree in Lincoln's—the legislature invaded the executive field. We, of course, all recall that Franklin D. Roosevelt sought to invade the judiciary with his now famous "court packing" effort.

Now we are witnessing an effort by Congress to usurp some of the prerogatives of the President, both in his position as head of the executive department and in his capacity as commander in chief of our military forces. For without going into the particular controversies themselves or the fears or reasons behind them, it is apparent that there is a movement for legislative interference with certain functions and agencies of the executive branch. Congressional committees seeking compulsory attendance of those in the executive branch and production of internal executive records; the movement for the Bricker Amendment and for the amendment to deny the President at any time—peace or war—power to take private property except pursuant to an act of Congress;[1] the effort to deny the President as commander in chief the right to "make" instant war in the event of attack while Congress may be debating a formal declaration of war and the implementing of necessary appropriations and legislation are all illustrative of potential legislative encroachment on the executive.

Perhaps this accepted practice of senatorial "choosing" of those to be appointed to the federal Bench when a President of their party affiliation is in office is but an illustration of an encroachment to which the executive has been forced by political exigencies to capitulate.

I may have proceeded too far in accepting as a premise what I have not yet substantiated—that this capitulation *has* occurred, and that *both* political parties for almost ninety years have considered the federal judiciary as falling in the sphere of partisan patronage.

Chief Judge Evan A. Evans, to whom I have previously referred, addressed the Legal Club of Chicago on February 14, 1944. These are excerpts from that speech:[2]

> Beginning with Grover Cleveland in 1884, and continuing until January, 1941, the figures are:
>
> (1) Grover Cleveland, who appointed 37 judges in all, none of whom were Republicans and one who was an Independent, a Mugwump who supported Cleveland, for a percentage of 97.3% Democratic appointments;
>
> (2) Benjamin Harrison, who named 29 new Federal judges, three of whom were Democrats, leaving 87.9% of his appointees, Republicans;
>
> (3) William McKinley, who named 23 new Federal judges, only one a Democrat, leaving 95.7% who were Republicans;
>
> (4) Theodore Roosevelt, who appointed 72 new Federal judges, two of whom were Democrats and one who was an Independent, or 95.8% Republicans;
>
> (5) William Taft, who named 45 new Federal judges, eight of whom were Democrats, leaving 82.2% of his appointees, Republicans;
>
> (6) Woodrow Wilson, who made 72 original appointments to Federal courts of all kinds, named only one Republican; thus leaving 98.6% of his appointees Democrats;
>
> (7) Warren Harding, with a total of 44 original appointments, of which one was a Democrat, leaving 97.7% Republicans;
>
> (8) Calvin Coolidge, who named 68 Federal judges, seven of whom were Democrats, leaving 94.1% of his appointees, Republicans;
>
> (9) Herbert Hoover, who named 49 new Federal judges, seven of whom were Democrats, leaving 85.7% of his appointees Republicans; and
>
> (10) Franklin D. Roosevelt, who has made 106 original appointments and has named no Republicans and two Independents, or 98.1% Democrats.
>
> . . . Mr. Taft in the first year of his incumbency filled five judicial positions in the Southern Districts, all of which were by Democrats. As the whole Bar of the South was *then*—(note I say *then*)—solidly Democratic, Taft, as he himself said, was *required* to name Democrats. If these five be eliminated, Mr. Taft's record would have been 93.2% Republican appointees.
>
> There is not much to choose between them, but the Republicans would seem to have slightly the better of the showing. Certain other factors should be considered, however. A party returning to power after a period out of office may find the Federal bench staffed with men of the opposite persuasion. This must be considered when measuring partisanship in judicial appointments. There is a natural incentive to equalize the situation not only by consistent appointments of members of the new majority to such vacancies as occur, but also to create new judgeships.
>
> When Cleveland became President, the Federal Judiciary was well nigh solidly Republican—not a single Democrat had been named to the Supreme bench since 1861. . . . On the other hand, when Harrison became President over 65% of the judiciary was still Republican. . . . When Mr. Taft became President, the judiciary was better than 90% Republican. . . . When he [Mr. Hoover] turned it over to Mr. Roosevelt, over 90% were Republicans . . . although the bench

1. Report of the Committee on Jurisprudence and Law Reform to the Midwinter meeting of the House of Delegates of the American Bar Association March 8, 1954.

2. As forwarded to members of the Association's Federal Judiciary Committee by its past Chairman, Howard F. Burns. T. I. McKnight, President of the Illinois State Bar Association, wrote the writer on March 29, 1954, that "The Judge was the senior judge of the Seventh U.S. Court of Appeals and a most meticulous judge and scholar. Knowing him as I did, I wouldn't hesitate to rely upon any computations he made."

> when Wilson left office was about 50-50 Democratic and Republican . . . 25 new judges were created, and 25 appointments were made by President Harding on the nomination of Mr. Dougherty . . . all Republicans. . . . During the Harding-Coolidge administrations this was kept up. The number of new judges created was not far from 100% of the judges in existence when President Harding took office.

It would appear, therefore, that from the Civil War until President Harding's Administration, there were always more Republicans on the Federal Bench than Democrats. And the first time an equal balance was neared, in the Harding administration, twenty-five new judgeships were created with Republicans appointed to all. The Democrats under Presidents Roosevelt and Truman followed this example.

The Present Situation . . .
History Is Repeating Itself

History is again repeating itself because the present Administration is filling the normal vacancies plus the large additional number of new positions recently created by the Congress, with Republicans—save only two positions in the South which have been filled with Democrats who had supported the Republican Presidential nominee in the last election.

Readers may be interested in some discussion of the workings and results obtained by this American Bar Association Standing Committee on the Federal Judiciary. As I said at the outset, I have served on the Committee since October of 1949. The operation of the Committee then and until the summer of 1952 was substantially this:

1. Whenever a vacancy occurred, or a new judgeship was created, if from information furnished by the organized bar associations or individual lawyers in the area the representative on the committee from the particular Circuit felt he could and should suggest a panel of names of those considered available and whom their fellow lawyers felt were outstanding, he would accumulate data on their qualifications and submit these to the entire Committee, along with his own recommendations. The committee would thereupon make a recommendation to the Attorney General—of the entire panel, or of only a few or perhaps of only one name.

2. If one of those so recommended was, in fact, nominated then, of course, the Committee urged confirmation.

3. Where no affirmative recommendations had been made by the Committee, or where one not affirmatively recommended was, in fact, nominated, the committee in the short time made available to it through the courtesy of the Senate Judiciary Committee, would undertake to similarly investigate the nominee and make a recommendation to the Senate committee. That recommendation was usually "for" or "against" confirmation—though on occasions it might be a neutral position. If confirmation was opposed, the committee would either actively appear in opposition or make only a written report of its reasons—depending on factors such as the position of the local associations and the nature and degree of the lack of qualifications according to the judgment of the committee.

For approximately the last three years of President Truman's Administration, based on my own tabulation from my files as a committee member,[3] excluding the territorial, municipal, claims and patent courts, of the forty-nine who were confirmed, eighteen had been affirmatively recommended by our committee, and of these we had considered thirteen to have been "outstanding appointments". Of the five whom the Senate did not confirm only three had been opposed by us. It might also be interesting to note that of the forty-nine confirmed, five were promotions from the district bench to the Court of Appeals. And I believe four of the forty-nine were Republicans.

When Ross L. Malone accepted the position of Deputy Attorney General under Mr. McGranery in the summer of 1952, he immediately inaugurated a new liaison procedure with our Committee which we acclaimed. There was added to our existing procedure this: Before nominating one who had not been affirmatively recommended by our Committee, the name of the one or more most seriously under consideration would be submitted to us for our investigation, report and recommendation. No actual confirmations occurred thereafter, however, under the Democratic Administration, so this modification cannot be properly evaluated.

With the advent of the present Republican Administration our committee acquiesced in a new liaison procedure at the request of Mr. Brownell. We no longer make any affirmative recommendations, and in return Mr. Brownell has retained the practice instituted by Mr. McGranery, through Ross Malone but with the important exception that nominations for the Supreme Court are made without there having been any prior reference to our Committee for investigation and report. I believe

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3. This tabulation, with the names of those placed in the various categories and with references made to the reports, was supplied by me to all members of the committee January 20, 1954, and as no member has disputed any individual classification I have assumed its acceptance by them as generally accurate.

our Committee is unanimous in strongly feeling there should not be this exception. None has been nominated from the Democratic Party save, perhaps, two in the South and these had supported the Republican national ticket. Except for the Supreme Court, no one was nominated, however, without his name having first been submitted to us.

Hamilton's observation has not been followed by either of the present-day parties.

Where the President is of their own party, the "choosing" of federal judges is by the Senators—and sometimes almost *without* the "advice and consent" of the President. But here again, perhaps, I have been tardy in submitting proof. All recall the conflicting efforts of the President and Senator Douglas to "choose" the three men for the three vacancies in Illinois—with 1952 national elections taking the choice away from both. Not so well known is another incident, however, between Senators George and Russell on the one hand, and President Truman on the other—where the Senators' "choice" prevailed. Our committee was in the fortunate position, however, of having highly approved confirmation of both!

Also known, perhaps, only to a few is the fact that Senator Dirksen succeeded, where Senator Douglas had failed, in "choosing" those to fill the Illinois vacancies, and one on the Court of Appeals in addition. Senators Duff and Martin have "chosen" one each for the three vacancies in Pennsylvania, with the President perhaps to be allowed to "choose" the third if Senators Duff and Martin continue unable to agree upon this third vacancy. Senator Langer, however, as of this writing, has not been so successful.

Another danger many lawyers have noticed developing over the years is the practice of the Attorney General's playing such an important role in suggesting to the President whom to nominate or promote in states or circuits whose Senators belong to the party out of power. Should the Presidents regain their lost prerogative of "choosing" in those areas represented by Senators of their own party, this danger—if it be one—would be increased. The Attorney General is by far the most frequent and important litigant before the courts over which he would exercise such a tremendous influence over appointments and promotions.

It is submitted that:

1. The American Bar Association should reaffirm its aims and objects to include unceasing efforts to promote the nomination *and* confirmation of the best qualified persons for the federal Bench, and on a nonpartisan basis.

2. Both political parties should be constantly urged to observe at least such precepts as are embraced in a proposed party plank each was unsuccessfully urged by the 1951 American Bar Association Annual Meeting to adopt:

> A qualified and independent judiciary is indispensable to the maintenance of a coordinate branch of government under our Constitution and to the protection of the freedoms and the rights of every individual. We commend the policy of the Judiciary Committee of the United States Senate during the past six years, irrespective of party affiliation, of requesting and considering a report and recommendation by the Judiciary Committee of the American Bar Association on nominees submitted by the President for judicial positions. Such policy *shall* be continued. We pledge that only the best qualified persons available shall be selected for appointment to judicial office and recommend that the good offices of the American Bar Association shall be availed of to accomplish that purpose.

3. The Presidents of the United States should be constantly reminded that Hamilton's observation concerning Article 2, Section 2, of the Constitution is the true intent of that article and that they should not surrender this presidential prerogative.

4. Some method should be devised whereby the President could be timely and impartially apprised concerning the highly qualified persons available for appointments to the federal judiciary—and by other than the chief litigant before those courts. The organized bar associations at all levels are one such source of information, and are certainly in a position to best know the character, temperament and abilities of their fellow lawyers. If they were to be thus utilized, I believe the organized Bar would then equip itself to properly and impartially perform such a function.

Proposed Amendments to the Federal Rules

■ Early last summer the Advisory Committee printed and published for the comments and suggestions of the Bench and Bar a Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, dated May 19, 1954.

In the foreword to the draft the Committee stated that it desired that all suggestions be in its hands by December 1, 1954, or earlier. Members of the Bar have indicated that many of them desire an extension of that date to permit them a longer time to study the draft. The date for the receipt of suggestions has been extended to March 1, 1955. All communications for the Advisory Committee should be addressed: Advisory Committee on Rules for Civil Procedure, Supreme Court of the United States Building, Washington 13, D.C.

As long as the supply lasts, copies of the Preliminary Draft of Proposed Amendments may be obtained by writing the Committee at its Washington office.

The New Internal Revenue Code:

Taxation of Life Insurance and Annuities

by **Charles D. Post** · *of the Massachusetts Bar (Boston)*

▪ **The Section of Taxation, working through an emergency committee and its committee chairmen, collaborated very closely with officials of the Treasury Department and with Congress during the legislative progress of the Internal Revenue Code of 1954. Through the hard work of the Tax Section representatives and the sympathetic consideration of the government officials, many recommendations previously made by the American Bar Association and the Section of Taxation are contained in the new code.**

▪ Upon the death of John Howard, a client, life insurance of $100,000 is payable to his widow, who can elect to have this amount left at interest, or to have stated amounts paid to her over a fixed period of years or throughout her life. Which option or combination should she elect? Apart from basic factors such as her probable needs, state of health and other resources, it is appropriate to consider what her taxable income is under each election. Another policy is payable to a daughter. Is the tax effect different for her?

Robert Johnson, another client, has three life insurance policies, with substantial cash values, which he finds it difficult to carry. He would like to sell one policy for its cash value to a corporation in which he and his family hold stock, and sell the others to his two grown sons, one of whom is a partner with him in a family firm. Which sale has the pitfall? Could the corporation deduct the premiums?

Elmer Fox has three endowment contracts and is nearing retirement age. His children are able to take care of themselves. He wants to turn two of the policies, one of which matured a month ago, into joint and survivor annuities and exchange the other for a life insurance policy payable to his widow. The present values of two of the policies including the matured contract are more than his cost. Which should he turn in for the life insurance? What difference does it make if he exercises an annuity option under the matured policy or exchanges the policy for a different annuity?

In most such cases, there is an insurance underwriter close to the picture and he usually has specific suggestions. If he is mindful of the guidepost rules of the National Conference of Lawyers and Life Insurance Companies, he will recognize that the determination of the tax and other legal effects of the various transactions is within the realm of the lawyer. It behooves the attorney to be worthy of this responsibility. More than $200,000,000,000 face amount of ordinary life insurance is now in force in this country, apart from group and industrial life, and other types of contracts. With new insurance being written in ever-increasing amounts (at a rate estimated at more than $100,000,000 per day) as standards of living and dying grow higher, each general practitioner is statistically likely to encounter a variety of problems. While taxation is but one factor, it is often an important one. The attorney is not expected to have a facile solution for each problem at his fingertips, but rather to have a sufficient general knowledge to recognize the existence and nature of a problem and the basic pattern into which it falls. From there he can proceed to solve it the same as any other legal problem.

Many changes have been made in the taxation of insurance and annuities in the new Code. Some basic concepts are unchanged. Some rules

NOTE: The Committee on Federal Income Taxes has a number of subcommittees working actively in connection with the promulgation of regulations on such subjects as returns and declarations of estimated tax, dependents and exemptions, medical expenses, deductions for child care, retirement income credit, depreciation, research and experimental expenditures, capital gains and losses, changes in accounting methods, prepaid income, reserves for estimated expenses apportionment of real estate taxes, free rooms and lodging, sickness and disability benefits, salesmen's deductions, alimony and separate maintenance agreements, bad debts, discharge of indebtedness, and readjustment of tax between years. Not all of these and the other subjects under consideration can be covered by articles in the AMERICAN BAR ASSOCIATION JOURNAL by reason of space requirements. However, selected items will be discussed in future articles.

which were uncertain are clarified, but some remain confused. It is the purpose of this article to outline the basic principles now applicable. These ground rules are relatively easy to state. Unfortunately they are sometimes more difficult to apply mathematically, as in the case of joint and survivor or refund annuities, or conceptually, as in the case of exchange of policies.

Effective Dates

In discussing federal income taxation in this area, one important basic distinction must be made at the outset.

Proceeds of life insurance paid by reason of the death of the insured are governed by one set of rules, under Section 101 of the 1954 Code. These rules apply if the insured died after August 16, 1954. The old law applies if the insured died before that date, even though monies are received thereafter (whether in a lump sum, by installments over a period of years, or by payments during the lifetime of one or more beneficiaries) *provided* the amounts are received by reason of the death of the insured.

On the other hand, whether the contract is one of life insurance, endowment or annuity, or bears some different title having the characteristics of one or more of these basic types, if the amounts are paid for some reason *other* than the death of the insured under a contract having the characteristics of life insurance, another set of rules applies under Section 72 of the 1954 Code. These rules are applicable in general to all amounts received after December 31, 1953, even though the payments began, or the right to receive them vested, before 1954.

I. Proceeds of Life Insurance Payable by Reason of the Death of the Insured

A. *Proceeds Paid in a Lump Sum.*

The general rule of the old law is unchanged that proceeds of life insurance payable by reason of the death of the insured and paid in a lump sum are completely excluded from gross income if the insurance policy has never been transferred for a valuable consideration.

If the policy has been transferred at some time for a valuable consideration, there may be a problem, but this is less likely than under the old law. Under the old law the excess of the insurance proceeds above the consideration plus premiums subsequently paid by the transferee was taxable as ordinary income *unless* the transfer was either to the insured himself, or part of a wholly or partially tax-free transaction, or gift, whereby the transferee had a substituted basis.

Under the new law the proceeds are non-taxable despite the transfer for valuable consideration if either of the above two tests is met or if the transfer is to a partner of the insured, to a partnership in which he is a partner or to a corporation in which he is a shareholder or officer. While the new law is more liberal than the old, great care should be exercised before any life insurance is transferred for valuable consideration, since if the transaction does not come under one of these exceptions, the policy is forever tainted with the ineradicable dye of taxability. The recommendation was made to Congress that this taint by reason of transfer for valuable consideration be eliminated completely, and the House Bill so provided. However, the Senate Finance Committee felt that the complete exemption might result in abuse by encouraging speculation on the death of the insured and therefore the Code as finally enacted extended the pre-existing limited exceptions upon transfer for valuable consideration only to those transactions above set forth. Mr. Johnson's non-partner son, in the second problem at the beginning of this article, should not purchase his father's policy. A gift is indicated.

"Proceeds of life insurance" include amounts paid by reason of death under contracts having life insurance benefits, including death benefits under workmen's compensation or accident and health insurance contracts having life insurance characteristics.

The provisions with respect to life insurance, however, do not apply to so much of any payment as is includable in the gross income of a "wife" by way of alimony or separate maintenance under Sections 71 or 682 of the new Code.

B. *Proceeds Held Under an Agreement To Pay Interest Thereon.*

The interest is taxable under both the old and the new Codes.

C. *Proceeds Payable Over a Period of Time.*

Life insurance proceeds payable by reason of the death of the insured in installments for either a fixed period of time or during the lifetime of one or more beneficiaries are taxable under a new set of rules. Of course the general comments above with respect to proceeds payable in a lump sum are applicable here to the basic lump sum value, which is described by the phrase of art "amount held by an insurer". It is assumed at this point that this lump sum value is fully exempt from income tax, leaving merely the problem of the taxation of the amounts paid over a period of time after death.

Let us take the typical case of John Howard mentioned at the beginning of this article. By reason of his death, $100,000 is payable under a life insurance policy to his widow. Let us assume that the widow has the right to elect to receive $11,200 per year for ten years, plus so-called excess interest earned by the company above that assumed in fixing the guaranteed right; and assume that the excess interest amounts to $300 per year.

If Mr. Howard died on or before August 16, 1954, so that the old law governed, his widow would be subject to income tax on merely the $300 per year excess interest. The balance would be exempt to her.

If Mr. Howard died after August 16, 1954, so that the new Code governs, his widow would be taxable on $500 per year. This is arrived at as follows: $100,000 is the "amount held by an insurer". This is divided by ten, the number of years over which the amount is to be paid. The

result is an annual exclusion of $10,000. The amount received each year in excess of this $10,000 is taxable, except that a surviving spouse has a special additional annual exclusion of $1,000. Thus the widow can exclude $11,000 per year. The $200 guaranteed and $300 excess interest she receives above this amount per year is taxable.

It is apparent that if a beneficiary other than a surviving spouse received this same amount per year under the same circumstances, $1,500 would be taxable.

If the beneficiary, instead of electing an option to receive payments over a fixed period of years, elects to receive the payments during her lifetime, a similar computation is made. The amount held by an insurer ($100,000) is divided by the life expectancy of the beneficiary as specified by the regulations. The exclusion applies even though the beneficiary outlives her expectancy. If the mode of settlement contains refund features, the actuarial value thereof is deducted and the balance is prorated, in accordance with the regulations. The prorated amounts are excluded regardless of the years when actually received.

Where the life insurance contract contains no option to receive a lump sum payment in cash, the amount held by an insurer is the value of the contract to each beneficiary concerned as of the insured's death, discounted by the insurer's interest rate and mortality tables. This is illustrated by the following example: Suppose John Howard dies after August 16, 1954, owning a policy which does not provide for any lump sum payment but provides for nonrefund annual payments of $5,000 to his widow for her life and concurrently $5,000 to his daughter for ten years. Assume the widow has a twenty-year life expectancy; and that the discounted value of the contract to the widow is $60,000 and to the daughter is $35,000. The widow excludes $3,000 per year ($60,000 divided by 20) and an additional $1,000, and is taxed on $1,000 per year. The daughter excludes $3,500 per year ($35,000 divided by 10) and is taxable on $1,500 per year. If Mr. Howard had died on or before August 16, 1954, the entire amount specified would have been free of income tax and only the excess interest, if any, paid in addition to the $5,000 per year would have been taxed.

II. Proceeds of Life Insurance Payable by Reasons Other than Death of the Insured; and Annuities.

Not only classic annuities (amounts payable during the lifetime of one or more beneficiaries) but also fixed period installments (amounts payable over a stated number of years, or annuities certain) are called annuities in the new Code. Receipts under annuity contracts and proceeds of life insurance and endowment contracts cashed in or paid as annuities are all lumped together and covered by the so-called annuity provisions in Section 72 of the new Code. As usual, amounts taxable to a wife as alimony or separate maintenance are exceptions. The new rules apply to all amounts received after December 31, 1953.

A. *Amounts Payable for Life.*

Amounts payable during the lifetime of a beneficiary are taxed under the new "life expectancy" rule. This rule applies wherever the expected return depends at least in part on one or more life expectancies.

The basic principle is that receipts by the annuitant attributable to the cost of the contract are excluded and the balance is subject to income tax. This is done by determining an "exclusion ratio" which gives a fraction of each guaranteed payment that is excluded from gross income. The exclusion continues to be available under an annuity involving a life contingency even after the cost has been recovered. It remains constant. The exclusion ratio is determined by dividing the "investment in the contract" by the "expected return".

The investment in the contract is the cost of the contract reduced by all amounts recovered tax free before the annuity payments commence. If an annuity involving a life contingency provides for a refund of the consideration or installments certain payable after the death of the annuitant or annuitants, the cost is further reduced, in determining the investment, by the actuarial value of such refund or installments determined under the regulations, to prevent a double exclusion.

Fabian Bachrach

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The expected return is the total amount that may be expected to be received during the life expectancy of the annuitant according to the regulations. If an annuity is payable during the entire remaining lifetimes of two or more persons, the combined life expectancy is used.

The above sounds complicated and in many instances it is. Fortunately in the simple case, when the amount of the guaranteed annuity payments is constant, there is a short method of computation. Simply divide the cost of the contract by the life expectancy of the annuitant. The result is the amount which may be

received tax free each year. The balance is ordinary income.

Unfortunately there are a number of problems involved in computing the "investment in the contract" or cost. Some of these problems will remain even after the regulations are finally promulgated.

The above so-called life expectancy rule replaces the so-called 3 per cent annuity rule of the old law whereby 3 per cent of the cost of the annuity was taxed each year and the balance excluded until the cumulative amount excluded equalled the cost; after which the total amounts received were taxable.

In most instances the net effect of the change is such that annuitants pay somewhat higher taxes in the first years in which they receive payments but somewhat lower taxes in the later years.

B. *Amounts Payable Over a Fixed Period.*

An amount payable over a stated period of years is sometimes called an annuity certain only. The basic principles of the new law and the computations are in general the same for this type of annuity as for the type payable during life, with the number of years certain substituted for the life expectancy.

Under the short computation, the total of the guaranteed payments is divided by the number of years during which they are to be paid. The result is the amount which may be received tax free each year. The balance is taxable as ordinary income.

This new "installment recovery" rule replaces the old "cost recovery" rule under which amounts received were tax free until the entire cost had been recovered; after which each payment was fully taxable.

C. *Date of Calculation.*

The foregoing computation for both types of annuity must be made on the "annuity starting date" which is ordinarily the date on which the annuity payments commence. However, if these payments actually commenced before January 1, 1954, then the "annuity starting date" is January 1, 1954, as though the contract had been then purchased. The investment in the contract otherwise determined is reduced by all amounts recovered tax free under the old law. In determining the character of the payment, only the contractual guarantees remaining to be fulfilled on January 1, 1954, are considered, but there is a special rule for determining the investment for a surviving annuitant if the other annuitant died before January 1, 1954.

D. *Amounts Not Received as Annuities.*

Amounts not received as annuities (and not payable by reason of the death of an insured under a life insurance contract) are governed by special rules.

1. *Dividends Before Payments Commence.* Such dividends are received tax free, merely reducing cost, unless they, together with the other amounts recovered tax free, exceed the cost of the contract.

2. *Dividends After Payments Commence.* Such dividends are taxable in full, since the exclusion ratio (the amount not taxed) is based solely on the guaranteed payments.

3. *Death Benefits.* Amounts payable, whether in a single sum or otherwise, following the death of an annuitant in the nature of a refund are taxable to the extent that, together with other amounts previously received tax free, they exceed the cost of the contract. Conversely, until cost has been recovered, such death benefits are free of income tax. This is the reason why cost is reduced by the actuarial value of the refund in determining the "investment in the contract" at the annuity starting date discussed in II A above; and this is one of the reasons why synthetic terms of art are used in the statutory formulae rather than relatively simple, but technically inaccurate, words such as "cost". A number of problems are latent in this area which it would serve no useful purpose to explore in detail here.

4. *Payments on Surrender, Redemption, or Maturity of a Contract.* Such payments received in full discharge of the obligation of the contract are included in gross income to the extent that they, together with other amounts previously recovered tax free, exceed the cost of the contract.

5. *Relief Provisions with Respect to Lump Sum Amounts.* There are two such relief provisions, which are new to the law. The first provides that if any amount is actually received in one sum, and if the application of the rules summarized above would result in income tax liability on all or part of it, the tax will be limited to what it would have been if the amount taxable had been received ratably over the year when received and the two preceding years.

Under the second relief provision, if a lump sum is due, and if there is an optional right to elect an annuity at the time the payment is due, and if within sixty days thereafter an election is made to receive such annuity, the doctrine of constructive receipt is not to be imposed on the lump sum as it was under prior law; the tax liability will be governed by the new annuity rules as payments are receivable under the annuity option.

6. *Interest.* Overriding all of the above is a provision that if an amount is retained by the company under an agreement to pay interest thereon, such interest is taxable in full.

7. *Provisions Outside Section 72.* Most of the provisions relating to the taxability of amounts payable by reason of death of an insured under a life insurance contract are found in Section 101; and most of the provisions relating to the taxability of other amounts received under a contract of life insurance, endowment or annuity are found in Section 72. However, there are various other provisions of the new Code where such payments, together with income generally, are affected. Among these is the retirement income credit. An amount otherwise taxable may qualify for retirement income credit if the various restrictions on that credit are not applicable. Also an income

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The Federal Securities Laws:

The Scope and Effect of the New Amendments

by Ralph H. Demmler and J. Sinclair Armstrong

■ **The Securities Act of 1933 and the Securities Exchange Act of 1934 were substantially amended for the first time in more than a decade by the 83d Congress. The amendments became effective last October. This article by the Chairman and a member of the Securities and Exchange Commission is intended to acquaint the practicing lawyer with the changes effected by the new amendments.**

■ Provisions of the federal securities acts vitally affecting the marketing of securities in interstate commerce were amended at the Second Session of the 83d Congress. The amendments are the first major changes in these laws in over a decade. The following is written to familiarize the Bar generally with the salient features of the changes.

By this legislation, sponsored by the Eisenhower Administration, recommended by the Securities and Exchange Commission and representatives of many business groups and passed unanimously by the Congress, certain provisions of the securities acts affecting the offering of new issues of securities and some other technical provisions of those laws were changed. The legislation was introduced by Senator Homer E. Capehart, of Indiana, Chairman of the Committee on Banking and Currency, and managed in the Senate by Senator Prescott Bush, of Connecticut, Chairman of the Subcommittee on Securities, Insurance and Banking. In the House it was managed by Representative Charles A. Wolverton, of New Jersey, Chairman of the Interstate and Foreign Commerce Committee. The bill (S. 2846) was signed into law by President Eisenhower on August 10, 1954, and became effective on October 10, 1954 (P. L. 577, c. 667, 68 Stat. 683, 83d Congress, 2d Session).

The good result produced by the Securities Act of 1933 has come in great measure from the fact that the issuer and the underwriter must come forward and make a public statement concerning the issuer's business, its finances, its securities and the proposed offering—and all of this under stern statutory liabilities, both penal and civil. This requirement of disclosure is itself a substantial deterrent to transactions that would not stand the light of day. The imposition of liability for inaccurate and incomplete information and the administrative processing by the Commission of material filed with it have improved corporate morality, accounting standards and standards relating to business information generally.

The present amendments in no way curtail the duty to disclose or the liability for non-conformity to the disclosure requirements, nor is there any decrease in the administrative powers of the Commission.

The most important change involves Section 5 of the Securities Act of 1933. Many of the other amendments are necessary to accommodate other sections of the Securities Act to the amendment of Section 5.

The change in Section 5 and the related changes have to do principally with the mechanics of the distribution of securities. These changes must be considered against the background of the Act before the amendment and practices thereunder.

The Securities Act before the amendment took effect made unlawful the offer or sale of a security to the public by mail or instrumentality of interstate commerce, such as the interstate telephone, until a registration statement with respect to the security had been filed with the Commission and become effective. Oral offers prior to effectiveness were not made unlawful by the Securities Act of 1933, that is, oral offers within the state. The period between the filing date of a registration statement and the effective date averages about twenty days. The seller of a security must deliver to the purchaser a pros-

pectus containing a summary of the information in the registration statement.

It is clear from the legislative history of the Act that the Congress intended that by dissemination of information during the waiting period the public would become informed of the essential facts relating to a proposed issue before the effective date of the registration statement.

Illegal "Offers" . . . *Free Flow of Information*

The securities industry has contended for many years that, in practice, the free flow of information concerning a new issue during the waiting period has been restricted because of the fear of underwriters and dealers, not to mention their lawyers, that communications to prospective customers might be construed to be illegal "offers" of a security before the effective date of the registration statement. This fear springs from the criminal penalties provided for violation of the statute and also from the fact that a violation of Section 5, based on a strict construction of the term "offer", might give the purchaser a right of rescission for one year under Section 12 (1) of the Act.

The Securities and Exchange Commission recognized that the distinction between "dissemination of information" and an "offer" is difficult to draw and still more difficult for a customer to appreciate, and was concerned through the years because the objective of a widespread dissemination of information during the waiting period was not more effectively achieved.

Accordingly, the Commission took administrative actions designed to encourage issuers and underwriters to make it possible for dealers and prospective investors to become familiar during the waiting period with the information which the statute intended they should have.

From the earliest days of the Commission's administration of the Securities Act, pre-effective summaries of information as filed have been permitted.[1]

In 1946, the Commission adopted a rule (Rule 131)[2] which provided that distribution of a preliminary prospectus before the effective date of a registration statement should not in itself constitute an "offer". This preliminary prospectus, usually filed as part of the registration statement, was popularly called the "red herring" prospectus, because a legend was printed in red on each page stating that it was not an offer to sell or the solicitation of an offer to buy and that it was preliminary, not final.

Since adoption of Rule 131, the Commission's action in accelerating the effective date of a registration statement has been conditioned upon a showing that there had been an adequate and timely distribution of the "red herring" to dealers who were expected to participate in the sale of the security to the public.

This rule and administrative policy achieved in part the original statutory objective. Since that time, as a matter of practice, underwriters and dealers who expect to participate in the distribution of a new security receive information concerning the new issue by means of a "red herring" prospectus, in advance of the effective date.

The "red herring" prospectus, however, does not lend itself to distribution to the public generally for the purpose of preliminary screening of prospective customers. It frequently cannot be secured in sufficient quantity in various parts of the country in time to permit its general use as a means to disseminate information or as a means by which underwriters and dealers may determine public interest in a forthcoming issue.

In 1952, the Commission took another administrative step designed to assist dealers to communicate with customers for the purpose of determining who might be interested in receiving the prospectus concerning a new issue. A rule (Rule 132)[3] was adopted which provides for a short notice of proposed public offering called an "identifying statement" containing prescribed minimal general information concerning a new issue. This rule likewise provided that the use of the identifying statement should not constitute an "offer" of a security for purposes of Section 5. Under this rule, an issuer was required to file the identifying statement with its registration statement and the Commission conditioned its action in making the statement effective upon a showing that copies of the identifying statement had been made available to dealers and underwriters.

Underwriters and dealers objected that Rule 132 does not permit the inclusion in the identifying statement of sufficient information to stimulate inquiries by investors for copies of the prospectus. They contended that the identifying statement fails in its purpose unless it contains more of a summary of the registration statement, including a summary of certain financial information.

These rules and policies—that is, the rule concerning the use of the "red herring" prospectus and the use of the identifying statement, and the policy requiring the use of these documents—are consistent with the Act. However, in view of the precise and sweeping prohibitions of Section 5, in view of the difficulty in distinguishing between the dissemination of information and the making of an offer, and in view of the difficulty of explaining that the use of a "red herring" prospectus is not an offer of the securities, the legislation just enacted contains amendments of the Act which would expressly support the practices which the Commission permitted and indeed required the industry to follow.

Basically, the amendment will permit written offers to sell and solicitations of offers to buy during the waiting period by means of a preliminary prospectus filed with the Commission prior to its use. The present prohibition against the making of an actual sale or contract of sale of a security prior to the effective date of

1. Securities Act Releases Nos. 464 and 802.
2. Securities Act Release No. 3177.
3. Securities Act Release No. 3453.

a registration statement is not affected by the amendment.

Issuers, underwriters and dealers should find no difficulty in regulating their conduct during the waiting period so as not to make contracts of sale before the registration statement becomes effective. This might be done by conditioning offers, limiting activity to solicitation of offers to buy or by other means which keep the transaction short of a sale or contract of sale. Contracts of sale or contracts to sell, not otherwise exempt, made effective upon the happening of a condition, as for example the becoming effective of the registration statement, would be illegal.

The New Amendment . . . *No Fundamental Change*

It must be apparent from what has just been stated that the amendment does not work any fundamental change; in fact, it may fairly be said to give more specific authority for the continuance of practices which have developed over the years under the present law, and to make those practices specifically subject to the sanctions provided by the Act.

To the extent the media of information which are permitted by the amendment are more widely disseminated, a larger segment of the investing public generally, and the smaller dealers, will have a greater opportunity to participate in the processes of capital formation.

No change is made in the provisions of Section 5 (a) (2) which prohibit the transmission of a security through the mails for purposes of sale or delivery after sale unless a registration statement is in effect.

The redefinition of "sale" to exclude offers (Section 2 (3)), together with the revision of Section 10 of the Act dealing with the contents of prospectuses, changes the effect of Section 5 (b) (1) of the Act to permit the making of offers during the waiting period by means of prospectuses containing summary information as well as by means of the "red herring" prospectus.

The provisions of Section 5 (b) (2) which require delivery of a complete prospectus in connection with a sale or delivery after sale are retained.

These changes made necessary a new Section 5 (c) which makes it unlawful to offer a security prior to the filing of a registration statement.

A conforming change in Section 10 is made so as to authorize the Commission to permit the use of a summary prospectus in addition to the conventional prospectus. This short-form summary prospectus will be filed with the Commission, as part of the registration statement, and must conform to the Commission's rules and regulations. In order to prevent the use of a summary prospectus which fails to meet the Commission's requirements, the Commission will be authorized to suspend the use of a defective summary prospectus. This administrative remedy, which is intended to supplement the stop-order powers of the Commission under Section 8, is considered essential because of the necessity for speedy action to prevent the use of a defective summary prospectus during the relatively short waiting period.

Since, however, the summary prospectus will involve condensation or summarization of the full prospectus and since that process necessarily involves omission, the amendment provides that preliminary and summary prospectuses authorized by this Section should not be subject to Section 11, which imposes liabilities upon the issuer, its officers, directors and underwriters for misstatements and omissions. This will not lighten the existing burden of liability because the "red herring" prospectuses permitted up to now are not subject, as such, to Section 11 liabilities. The administrative sanctions of Section 8 and the suspension power, coupled with the liabilities of Sections 12 and 17, which provide for civil liabilities and criminal penalties against sellers, can be relied upon to guard against the use of defective summary prospectuses.

As above stated, the prospectuses and summary prospectuses provided for by the amendment are to be filed with and processed by the Commission before being released to the public. Issuers, underwriters and dealers

Chase

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Harris & Ewing

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are not permitted to send out unprocessed sales literature prior to effectiveness of the registration statement. The amended law was not intended to permit pre-effective "free-writing."[4] However, under an amendment of Section 2 (10) (b) of the Act the so-called "tombstone advertisement" may be used, subject to Commission rules, to solicit inquiries for the prospectus or summary prospectus and may be used after the filing of the registration statement as well as after the effective date.

At the effective date of the amendment to the law, the Commission adopted some technical revisions of its rules to bring them into conformity with the new legislation.[5] These are of a "housekeeping" nature. A new rule (Rule 460) restates the requirements for preparation and distribution of preliminary prospectuses previously embodied in Rule 131 (discussed above), which was rescinded. The Commission is presently engaged in drafting new rules to implement all of the provisions of the amended acts, with particular emphasis on the rules for summary prospectuses and "tombstone" advertisements. These should be released for public comment within a short time.

One further change of substance in Section 10 should be mentioned at this point although it is not directly related to the Section 5 problem. Before amendment, Section 10 (a) provided that a prospectus should contain the information contained in a registration statement and that when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in such prospectus shall be as of a date not more than one year prior to its use.

The effect of these provisions was to require more current disclosure for prospectuses employed after the expiration of the first thirteen months of an offering than during the first thirteen months. This arises from the fact that some of the information in the registration statement at the time it becomes effective may be as of a date in some instances as much as six months prior to the filing. The requirement that the information in the later prospectus be as of a date within one year of its use has presented something of a problem in many instances because it required the preparation of interim certified financial statements—an expensive process.

The Section 8 of the amending Act provides that when a prospectus is used more than nine months after the effective date, the information in the prospectus shall be as of a date not more than sixteen months prior to such use. This will make for less discrimination between offers of short duration and those of long duration, without diminishing the quantity or quality of information supplied investors.

The next amendment relates to the use of prospectuses after the effective date of a registration statement. The law has required underwriters and dealers to deliver prospectuses to investors as long as they are engaged in the initial distribution of a security. Moreover, any dealer, even though not a participant in the distribution, had to deliver prospectuses to his customers in trading transactions for at least one year after commencement of an offering. The amendment (Section 6 of the amending Act amending Section 4 (1) of the Act) provides for delivery of prospectuses in trading transactions during the actual offering period but in no case less than forty days after the effective date of the registration statement or forty days after the commencement of public offering, whichever expires last. It does not change the requirement that prospectuses be delivered by underwriters and dealers so long as they are engaged in the initial distribution of the security.

The one year provision with respect to trading transactions has long been recognized as unrealistic. Moreover, dealers trading in a security publicly offered within one year find themselves unable to obtain prospectuses. This fact rendered compliance by dealers and enforcement by the Commission difficult.

In view of the continuous offering of securities by certain types of investment companies, particularly those commonly referred to as "mutual funds", a special provision for mandatory use of prospectuses by dealers over a longer period is provided by an amendment to the Investment Company Act (Section 402 of the amending Act, amending Section 24 (d) of the Investment Company Act of 1940).

The Act of 1934 . . . *Extension of Credit*

Turning to the Securities Exchange Act of 1934, the first amendment relates to the provision covering the extension of credit by dealers on new issues. Section 11 (d) (1) of the Securities Exchange Act prohibits a person who is both a broker and a dealer from "taking into margin accounts new securities in the distribution of which he participated during the preceding six months". This was intended in part to restrain distributors from selling new issues of securities to their brokerage customers on credit. The apparent purpose was to provide that new issues would be initially placed with investors rather than with speculators. It is generally agreed, however, that the prohibition against extending credit for six months after the end of the offering period is unnecessarily long.

Section 201 of the amending Act reduces the six-month period to thirty days, but the amendment will not permit extension of credit by a member of the selling syndicate or group while the selling or distributing process is in progress or for thirty days thereafter. It is believed that Section 11 (d) as so amended will be sufficient to assure that new issues will be sold on a cash basis.

The next amendment, relating to "when issued" trading, is designed as essentially a technical amendment to remove an ambiguity in the law

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4. Form S-9 adopted July 21, 1954, Securities Act Release No. 3509.

5. Congressional Record, July 28, 1954, page 11886.

The Selection of Judges:

The Faults of the Pennsylvania Plan

by Stephen A. Teller · *of the Pennsylvania Bar (Wilkes Barre)*

■ The Pennsylvania plan for judicial selection is a modification of the American Bar Association plan which provides for the choosing of judges from a list furnished by a commission of lawyers and laymen, with the provision that the voters shall, at stated intervals, vote on the question, "Shall Judge——be retained in office?" Mr. Teller is opposed to the adoption of the modification of the plan in his own state, and he tells why below. On page 142 of this issue of the Journal, Langdon W. Harris, Chairman of the Pennsylvania Bar Association's Committee To Support the Pennsylvania Plan for Selecting Judges, replies to Mr. Teller.

■ We are all familiar with economic cycles, and I believe we go through cycles in our political thinking. In our century, the twentieth century, we seek to have our judges as learned in the law as possible. We try to cut down and emasculate the power of the jury by eliminating the unanimous verdict, by providing for juries of six instead of the traditional number of twelve and by limiting the area within which the verdict or findings of a jury may operate or be binding. By slow degrees in the twentieth century we have whittled away the power of the jury. Yet a hundred years ago the trend was the other way. In the nineteenth century we sought to democratize our courts. In the eighteenth century, in 1776, the judges, appointed by the King, represented political policies far too often alien to and at odds with the political beliefs of the American colonists. Deep-seated prejudices arose against the courts and the judges which lasted for many generations, and we still see vestiges of them in the lay judges of Pennsylvania. As America moved westward across the continent and new states were formed from the new territories, we find much of the early legislation providing that juries shall be the triers of the *law* as well as of the fact (a practice, by the way, which was followed in another democracy, Athens, during its golden age). Lawyers were suspect. Judges were not required to be lawyers. When Abraham Lincoln was a lawyer in Illinois one hundred years ago, the spirit of the democratization of the courts was strong, and in Sandburg's biography of Lincoln we find it discussed at some length. The *Encyclopedia Americana* states that "lay judges were common in the state courts of first instance until quite recent times". All this I point out to illustrate that trends in political thought vary, that the cycle goes round and round. The present trend is to remove the judges as far as possible from politics. First, whether this can be done, and second, whether it is a good idea, are questions which we shall try to determine later on.

First, let us eliminate federal judges from our discussion. All federal judges are appointed by the President, by and with the advice and consent of the Senate, and hold office during good behavior, being removable only by impeachment.

On the other hand, as a general rule, state judges are elected for a term of years and the manner of their choice or election is governed by the state constitution.

Every experienced lawyer realizes that it is most difficult to obtain absolutely impartial justice. Every judge has his own personal foibles, inclinations, or unconscious prejudices, which, try as he may, will on occasion come to the fore. Naturally, a judge who has for years been a defendants' lawyer, a lawyer handling negligence cases for insurance companies, will be defendant-wise inclined. All astute practitioners know that in certain situations it would be injurious to their clients to go before certain judges and beneficial in other instances. I firmly believe that the unanimous verdict reached by a jury of twelve intelligent jurors, such as we have in this country, is just about as free from prejudices as can be reached. Each juror may have his own inclinations and leanings, his own personal eccentricities of

thought, but the composite verdict of all twelve is invariably just and proper.

Judicial Selection . . . *The Historical Background*

The elective judiciary of this country really dates from only about a hundred years ago. In Colonial times and in pursuance of the English system, most judges were appointed by the governors, a few by the legislatures. The Revolution did little to change this; and as new states came into the Union during its first half century, about half of the judges were appointed by the governors and the other half by the legislatures.

The idea of selecting judges by popular vote arose in the first part of the nineteenth century, when under the influence of the French Revolution in Europe and of Jacksonian democracy in the United States, popular election of all public officials for short terms was brought forth as the cure-all for all governmental problems.

Under the influence of this movement for popular election of all officials, most of the early American states changed to an elective judiciary, and all of the states which were subsequently admitted to the Union adopted the elective system of choosing judges. As a result, at the present time, thirty-six of our forty-eight states choose their judges by popular election. In twenty-two of the thirty-six, judges run as nominees of political parties, and in fourteen of the thirty-six states, they run as individuals without any party designation. Under the latter system, any lawyer may file as a judicial candidate in the primary election, and the two top primary candidates fight it out in the final election. In the remaining twelve states of the forty-eight, judges are either appointed by the governor, elected by the legislature, or chosen by some combination or variation of these two systems.

The New York constitutional convention of 1846, which substituted popular election for appointment of all New York's judges, really ushered in the era of elected judges in this country. Thereafter, the American states almost literally stampeded into the elective judiciary. This was the era of "Jacksonian Democracy". Exhilarated with the success of their young republic, Americans were eager to extend its principles in every direction. In 1845 the Governor of New York declared that in his opinion many officials then selected by the governor's nomination might be directly elected by the people and be "more in accordance with the popular feeling". This was not a stampede which began overnight. Instead it was the culmination of many years of effort to make the judiciary more responsible to the electorate. Our American law has always been a growing, living thing, forever forced to keep pace with the times. Oliver Wendell Holmes, our great jurist, in a now hotly disputed statement, once went so far as to say that morality changes with the times and different standards of morality, changing with the times, are to be determined by the Supreme Court. Be that true or not, a judge, sitting in an ivory tower, unresponsive to the will of the electorate and not compelled every ten years or so to hold his record up to review, may fail to keep pace with the times.

There were instances, perhaps too frequent in number, in the early nineteenth century, when judicial decisions had been noticeably partial to the landed and propertied classes, and the people thought, not without reason, that elected judges would be closer to the people and hence would deal more fairly with them.

Along with the election of judges came the short term—the obvious object of which was to make possible the rejection of an unsatisfactory judge with a minimum delay.

Such was the situation in 1850, a century ago.

How, then, did the people get along after they had succeeded in establishing an elected judiciary over most of the country?

The experience of a century or more with an elected judiciary has disclosed many weaknesses in that system and has resulted in widespread demands for some better method of electing judges. Recent indications of this dissatisfaction are two articles in national magazines: one, an article in the November, 1948, issue of the *Reader's Digest* entitled "Let's Have Competent Judges" and the other, a series of two articles in *Collier's* magazine entitled "Our Reeking Halls of Justice".

Criticism of an elected judiciary centers around the charge that it has not resulted in getting the best qualified men elected to the Bench nor in getting the best service from judges while in office. Critics of an elected judiciary recognize that many good judges have been elected and kept on the Bench under the elective system, but they feel that these good judges do not compensate for the poor and unfit judges whom this system has produced.

There are three systems used for the election of judges. The convention party system, the open primary party system, and the nonpartisan judicial election (and incidentally all three have been used in Pennsylvania, as well as the appointive system, which was used in Pennsylvania for seventy-five years).

In states where judicial candidates run on a party ticket, the criticism has been

(1) That in many cases, both under the party convention and the party primary system, the nominee is picked and controlled by party bosses;
(2) That service to the party rather than judicial ability often determines selection of the nominee; and
(3) That a party judicial candidate usually wins or loses with the balance of the party slate, regardless of judicial ability.

The non-partisan judicial election has come in for even greater criticism. Under this system, it is charged

(1) That it is impossible for most voters to know the qualifications of judicial candidates in the more populous districts;
(2) That judicial elections often be-

come mere undignified popularity contests; and

(3) That some lawyers with no judicial qualifications and no chance of election file and campaign for judicial office as a means of bringing their names before the public and building up their law practice.

It is also charged that few lawyers who are qualified to be judges are willing to become candidates for judicial office in a popular election because of the necessity of making an undignified political campaign and also because of the uncertainty of tenure of an elected judge, who upon election to the bench must give up his law practice and turn his clients over to other lawyers. It is also charged that this uncertainty of tenure tends to prevent proper training and seasoning of judges because in many cases a judge who has served one term and has just begun to be properly trained will be turned out of office in favor of a new and untrained man.

The average judicial campaign in our larger cities does nothing to produce popular respect for our courts or for our American system of administering justice. The following quotations give a true picture of many judicial contests in our larger communities. The first quotation is an editorial from a Detroit, Michigan, newspaper entitled "How To Be Elected Circuit Judge in Detroit".

The editorial states:

> Applicants for this position should possess the digestion of an ostrich, a firm right hand with a capacity of at least three thousand shakes a day, a keen memory for faces and names, dignity tempered by geniality and affability, a fluent tongue coupled with the ability to talk to all sorts and conditions of men—and say nothing offensive and leave the listeners with an impression that the speaker is a person of vast wisdom, good humor and tolerance.
>
> Applicants should also be able to attend a series of luncheons, club and lodge meetings, smokers, dances, a banquet or two, and several sports events in the course of a day and yet find time to attend to the exacting duties of the bench. This, of course, presupposes the physical strength to get along with little or no sleep.

The other quotation is from an address to the American Judicature Society by Judge John Perry Wood of Los Angeles. In describing a judicial election campaign in Los Angeles, Judge Wood said:

> At election time, the judges of Los Angeles and the candidates for the bench spread their names over the county by every method known to advertising. They were billboarded like a popular soap, sidewalks and public halls were littered with cards extolling the merits of candidates asking to be permitted to sit in judgment over the lives and property of the people. Contributions were solicited from firms frequently in court. One candidate collected $50,000 for a position that paid $10,000 a year.
>
> Some of the candidates degenerated to the depths of the promoters of cigarette sales campaigns. One candidate agreed to dispense "Justice with Mercy" if re-elected; however, the voters preferred the candidate offering "Evenhanded Justice." Another candidate offered to conduct a "Fair and Friendly Court" if elected, but the voters turned him down for the judge offering to "Save a Life." It was facetiously said that after this judge saved his own life by being re-elected, the campaign to "Save a Life" then and there terminated.

I noted above the three methods of choosing judges under the elective system—the convention, the direct primary, and the non-partisan ballot.

The convention system has long been abandoned in Pennsylvania and almost all the states. It was boss controlled and everyone agreed that it be abandoned. It was. I need discuss it no further.

The Best Method . . . *The Direct Primary*

We are more concerned with the direct primary, which despite its evils, is the best method for the selection by election of judicial and other candidates. This is the system in use in Pennsylvania at the present time.

The great criticism of this system is that it does not work in our large cities such as Chicago, Detroit, and New York, in the selection of judges of the highest caliber. I believe this criticism to be true.

Here is an extreme example. It happened in Detroit in the years of the Democratic landslide under F.D.R. and the New Deal. Detroit has eighteen circuit judges—elected at the same time. Following the Democratic landslide of 1932, the prospects for replacement of at least some of the sixteen Republican circuit judges by Democrats seemed to be unusually bright. In the 1934 primary election there were thirty-nine candidates on the Republican ticket for the eighteen judgeships and one hundred eighty-one on the Democratic ticket, a total of two hundred twenty.

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Most of the candidates were unknown to the voters. Almost every billboard in the city was purchased by the candidates. Many of these displays reflected unethical and unfair statements and devices. Two brothers, both candidates, pledged, on billboards and in distributed literature, to remit $43,200 of their salaries, if elected. Another promised each day to give free legal advice to the public. Another promised a liberal construction of the law in keeping with the ideals of the New Deal. One advertised "Succeed with Successful Steiner". Another billboard

ad portrayed a man evicted from his home as a preface to the assurance that such an eviction would not have occurred had a named candidate been in office. Another candidate was accompanied to political meetings by barelegged girls in stage dress who distributed his cards.

After that, Michigan resorted to the separate, non-partisan judicial ballot at both primary and general elections as to county judges.

This non-partisan judicial ballot has also been in frequent use. In Pennsylvania we adopted it in 1913 for the nomination and election of judges. It was repealed eight years later, in 1921. Since then Pennsylvania judges have been nominated and elected on party tickets, although a candidate for judge may and invariably does, run on both tickets, Republican and Democrat.

I will briefly touch on the chief objections to the non-partisan plan. First, the people just don't bother to vote, particularly where it is a separate non-partisan election or ballot. Second, with every judge his own political leader he must constantly do political favors for everyone, keep his ear steadfastly to the ground and at election time resort to cheap publicity stunts to gain publicity.

The Pennsylvania Plan . . . *Another Method of Selection*

Just what is the Pennsylvania Plan for selection of judges?

As criticism of popular election of judges mounted, particularly in the large cities, there were proposals for other methods of selecting judges. The most noteworthy of these was made in 1914 by a resident of Chicago, Professor Albert M. Kales of the Northwestern University Law School, in a bulletin published by the American Judicature Society.

In 1934 California adopted a judicial selection system for its appellate courts similar to the Kales proposal. I will refer to the California Plan later.

In 1937 the House of Delegates of the American Bar Association unanimously adopted a resolution recommending a judicial selection plan substantially similar to the Kales proposal.

In 1940 Missouri adopted a plan similar to that proposed by the American Bar Association and called the "Missouri Plan".

On July 2, 1947, the Pennsylvania Bar Association unanimously approved the Pennsylvania Plan for the selection of judges. This can only become effective by a constitutional amendment, which requires the approval of the legislature at two consecutive sessions and also the approval of the voters of Pennsylvania in a special question on the ballot.

Here, then, is the Pennsylvania Plan, which differs only slightly from the American Bar Association plan, the California plan and the Missouri plan. (This is the approved statement of the Pennsylvania Bar Association).

> The plan provides that when a vacancy exists in the office of judge of an appellate court or in a court of record in Philadelphia and Allegheny Counties, the Governor shall fill it by appointment from a panel of three persons nominated to him by a non-partisan judicial commission. If the names presented to the Governor are unacceptable to him, the judicial commission will nominate successive panels until an appointment from a panel is made.
>
> Each judge appointed by the Governor serves a trial period of at least twelve months and thereafter at an appropriate election—general for appellate judge and municipal for local judge—the judge's name is submitted, unopposed, to the voters on a separate ballot without party designation. The single issue is:
>
> If a majority of the voters who mark the judicial ballot favor the retention of the judge in office, he serves for a full term and at its expiration may run again, unopposed, for another term. If the judge is not to be retained, the vacancy is filled by appointment from a panel of three names nominated to the Governor by the judicial commission.
>
> Each judicial commission is composed of one judge, three members of the bar selected by a plan to be promulgated by the Supreme Court, and three lay citizens appointed by the Governor. The commission for the appellate courts is chosen from the state at large, and the commission for each judicial district is chosen from that district, no member of the judicial commission during his term of service may hold any office in any political party or organization and only the judge may hold elective public office.
>
> No judge who serves under this plan may directly or indirectly make any contributions to, or hold any office in, a political party or organization or participate in any political campaign.
>
> At any municipal election the qualified voters of any judicial district, other than Philadelphia or Allegheny County may elect to adopt this plan, or, having adopted it, may elect to discontinue it.
>
> Upon adoption of the amendment, all sitting judges in the Courts affected will be subject to the provisions of the plan.

That is the Pennsylvania Plan.

It differs from the American Bar Association and Missouri plans in that the governor is not bound to make his choice from the first three names submitted to him, but may call for successive groups of names until a person of his choice has been proposed. I regard the American Bar Association and Missouri plans as superior in this respect.

The California plan calls for appointment first by the governor and ratification of his choice by the judicial commission.

The most important point for us to note about all of these plans is this: The California plan pertains only to the appellate courts, the American Bar Association plan only to appellate courts and large cities, the Missouri plan only to appellate courts, Jackson County and St. Louis, and the Pennsylvania plan only to the appellate courts and Philadelphia and Allegheny counties. Smaller counties may adopt the plan at any municipal election.

The grass always looks greener on the other side of the fence. Capitalistic nations seek to cure certain evils by adopting socialism until, having socialism, they perceive that it too has its faults. How have the California and Missouri plans worked and what are the chief criticisms of them?

The Missouri Plan is riddled with politics.

The California Plan pertains only to the appellate courts and, there-

fore, we should examine more closely the workings of the Missouri plan in Jackson County and the City of St. Louis, where all judges are now appointed under this system.

Here are the criticisms after seventeen years in California and eleven years in Missouri:

(1) To date every single judge appointed by all governors has been from the governor's own political party. The Democratic governors appointed only Democrats, and the Republican governors appointed only Republicans.

(2) Only one judge has been rejected. Appointment is practically equivalent to life appointment. The good, the bad, and the indifferent, once appointed, are there to stay. It is almost impossible to defeat a judge who has no opponent to run against him. A judge to be rejected must be worse than just passable. His conduct must be such that the Bar and the newspapers are aroused against him.

(3) Where there is only one newspaper, as in Kansas City, the plan places the election or rejection and particularly the rejection in the hands of that newspaper.

Generally speaking, the public reaction has been favorable; Republicans and Democrats were evenly matched in Missouri. Judges went in and out of office not on their integrity and ability but whether the people of Missouri or Kansas City or St. Louis liked or disliked the Fair Deal or the New Deal, Herbert Hoover or Woodrow Wilson. As Fred L. Williams, former Justice of the Supreme Court of Missouri put it: "I was elected in 1916 because Woodrow Wilson kept us out of war. I was defeated in 1920 because Woodrow Wilson did not keep us out of war. In both of the elections not more than five percent of the voters knew I was on the ticket."

The people of Kansas City and St. Louis wanted a change. They got it, and they are pleased with what they got.

Is the plan being adopted in other states? The following is as of June, 1951. In Illinois the American Bar Association plan for selection of judges for the Municipal Court of Chicago had advanced to third reading in the Senate. In Michigan the American Bar Association plan was killed in committee. In Nevada a constitutional amendment empowering the legislature to appoint district judges failed to pass. In New Mexico a version of the American Bar Association plan was passed by the legislature and will be submitted to the people at a special election in September. In Utah the American Bar Association plan was rejected and in West Virginia it was killed in committee.

Is there any likelihood that the Pennsylvania Plan will be adopted in Pennsylvania? Bear in mind that an amendment to the state constitution is required which requires the approval of the legislature at two consecutive sessions and also the approval of the voters in a special question on the ballot.

The plan was brought on the floor of the State Senate on July 30, 1951. Senator W. J. Lane of the 46th District of Pennsylvania made a speech about it, which was referred to in the newspapers. I wrote to Senator Lane for a copy of his speech. He promptly sent it to me. Here is what he said and this is how the majority of the State Senate seems to react to the plan:

Recently there has been considerable agitation by certain individuals for the adoption of the Pennsylvania plan for the selection and tenure of judges.

I am still of the opinion that the present division of government in Pennsylvania, as provided by the Constitution, should be maintained. The Constitution has always provided for three divisions, executive, legislative, and judicial, the representatives of each being elected by popular vote.

There has been a noticeable growth in the extension of authority by the executive department, so that, by means of patronage and other pressure, the legislative program generally, has been determined by the executive. I am convinced the judiciary should be a free and independent department, under no obligation whatever to the executive. The history of Europe, furnishes many illustrations of the disappearance of human freedoms, where a controlled judiciary exists.

I do not find any fault with the fact that a judge is answerable to the electors each ten years; in fact, I think he should be. While the electors will make some mistakes in selecting their judges, and other officials for that matter—and they have done so in the past, principally by reason of the indifference of voters—I do not think there will be as many mistakes as will result from the selection of judges by politically elected officials.

You will notice there has been a departure from the Missouri plan. In the Missouri plan the selection must be made from the three names submitted by the commission. By the Pennsylvania plan, if none of the three names submitted are satisfactory to the executive, he can require three additional submissions, and so on, until the name of the person he desires to appoint has been submitted. So, any apparent choice by the commission is only a pretext.

An election where the voter has a choice only of voting "yes" or "no" on the one candidate submitted provides no fair test of the judicial fitness of that candidate. Particularly, is this true where a rejection of the candidate, will only result in another appointment, by the executive.

The plan is non-political in name only. It is a fact that in Missouri, where it has had the longest experience, all appointments by the governor have been from his political party. Missouri during that period has had governors from both parties and this has been a uniform practice. *If the same course be followed in Pennsylvania, the effect would eventually be to make all judges members of one party.*

If the real purpose is to remove the political feature from the election of judges, a constitutional amendment is not required. Pennsylvania did operate at one time under a non-partisan ballot, for the election of judges, which apparently worked so successfully that it was unsatisfactory to the majority political party and therefore the act was repealed.

There has been entirely too much drift towards the centralization of power, and I think it would be unfortunate for the electorate to surrender their right to select their own judges. It is absurd to argue, that the ordinary voter is too incompetent, or so untrustworthy that he is not fitted to select the judges of the district in which he lives, but is perfectly competent by party ballot to select the governor, who, in turn, appoints the judges.

The Pennsylvania plan was rejected by the state senate.

The statement of Senator Lane

is succinct and to the point. It shows clear perception and careful study. Senator Lane put his finger precisely on the weakness of the Pennsylvania plan—the fact that successive names must indefinitely be submitted to the governor until one is submitted which suits his choice.

In my opinion there is no likelihood that the Pennsylvania plan will be adopted. I am personally opposed to it, although I am not opposed to the American Bar Association plan for the selection of appellate court judges. I believe that there is far more opportunity, however, for a Democrat to be seated on the Superior and Supreme Courts in Pennsylvania under our present system than under the American Bar Association plan.

The Selection of Judges:

The Virtues of the Pennsylvania Plan

by Langdon W. Harris · ***of the Pennsylvania Bar (Philadelphia)***

■ Good government and good courts are tied together. Good government cannot exist without good courts, and the people for whom the courts exist must have full confidence in them.

It makes these polls disturbing:

In 1934 the American Bar Association sent questionnaires to 1,430 bar associations throughout the country, asking whether a change in the method of selecting judges was desirable. The result showed that states were opposed to a change where judges were appointed. Where judges were elected, lawyers were dissatisfied and wanted something new. The objections to the elective system were:

(1) Political influence outweighs merit.

(2) It is not possible in state-wide elections, or in urban elections, for voters to estimate the qualifications of the candidates.

(3) Judges are intimidated by political leaders.

(4) Lawyers of the higher qualifications are not attracted by a career on the Bench.

This demonstrates that lawyers, who are more familiar with courts than laymen, are *dissatisfied with the elective method.*

In 1939 a poll of the public was taken and 28 per cent of those questioned said in effect they did not believe our local courts were honest. That is not true, but it is damaging to the courts' prestige and confidence in them. (3 *Public Opinion Quarterly*).

Let's examine and determine if a basis exists for such a result, and whether politics is doing the damage.

(1) It is common knowledge that our governors almost always rely on political leaders for judicial material. An example of this is illustrated by the headline of *The Philadelphia Evening Bulletin* of April 10, 1952, to the effect that two were named judges of the Philadelphia Municipal Court but that the Governor took no action on the third judgeship created by the legislature. The article on this news item said, "The inability of Philadelphia Republican leaders to agree on the third judge has delayed that appointment since January 14 when the Governor signed the bill authorizing the increase." This article went on to comment that a legislative leader at first seemed to have persuaded the Governor to name his administrative assistant, but was blocked by one of the leaders who favored another.

(2) The Kefauver Committee, investigating crime in interstate commerce, found that the political machine and rackets in all the large cities were in partnership. The report on Philadelphia was this: "The Philadelphia story differs only slightly from the pattern of organized crime that the committee has found to exist in a number of other cities. The principal organized crime is the numbers game. . . . The numbers game in Philadelphia has achieved the size of a big industry, and like big industry, it appears to be organized on a highly efficient scale. It operates through tight control, manipulated by a *politico gambler-police tie-up* that makes it impossible for an intruder to edge his way in from the outside."

(3) On January 4, 1954, new judges of the Philadelphia Municipal Court were sworn in office and at 3:00 o'clock in the afternoon there was a re-organization meeting in the Muncipal Court because they

were selecting a President Judge. There was a contest. This is what happened: A prominent political leader and his trusted political lieutenant and his business partner took a position outside of the offices where the judges were to meet, to contact them as they headed for the meeting. Just before the meeting got underway, the leader gave final instructions to two of the judges, both of whom had taken their oath of office on the morning of the same day and who had been slated by the Republican Party on the recommendation of the political leader. Shortly after instructions were given to those judges, another judge walked down the fifth floor corridor and went into a huddle with the leader. As this judge walked away, the political leader said, "He is all right, he is going to nominate." A few minutes later, another judge walked down the corridor, arm in arm with another ward leader, who gave a nod of assurance to the first ward leader. After the fourteen judges were closeted, the ward leader instructed his political associates to accompany him to the chambers of one of the judges down the hall.

To determine its accuracy, I called the reporter who covered that story and told him I should like to verify it and would pay him a visit. He said, "I am going to be out, but I want to tell you a trip will be unnecessary because I was there and I saw it and heard it, and everything in that account is correct."

To summarize, we find:

(1) That political leaders are the main influence in the selection of judges;

(2) That they are so recognized by the chief magistrate of the state;

(3) That a group within the political class have a tie-in with the rackets. In Philadelphia, the Kefauver Committee found it to be the numbers game; and

(4) That some leaders attempt to exercise their influence on some judges.

Do such actions generate or destroy confidence in our courts? Of course there can be only one conclusion—THEY DESTROY.

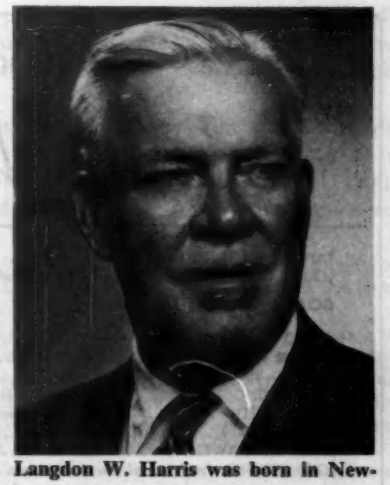
The loss of confidence in anything is bad, be it relative, friend or institution. When it involves justice and the courts, it can be disastrous. Its gravity is reflected in an address by Heinz L. Krekler, Ambassador from Germany to the United States, given before the Pennsylvania Bar Association at Harrisburg on January 22, 1954. Speaking on the role of law in the consolidation of Europe through integration, Mr. Krekler said, "up to the year 1914, notwithstanding wars in Europe, there was a high degree of economic cooperation between the war countries. As a matter of fact, there was an integration in European economy and consequently a high standard of living. The question often is raised, why don't we return to the situation that existed prior to 1914. In my opinion, there are several reasons. Europe since 1914 has been through one crisis after another. There have been all sorts of crises, political, social, monetary and economic. Yet I think the greatest crisis, or better said, the resulting crisis, *has been the loss of that confidence, the loss of confidence of the European man on the street, in justice and the permanency of law and order.*"

To establish justice, provide for the common defense and promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, are four of the purposes stated in the Constitution. The first of the four is to establish justice, and for a good reason: if that fails, the others fail.

Our courts of Pennsylvania have judges who possess courage, independence, high moral character and huge legal capacity. But lawyers, and the public, too, know that men lacking judicial qualities have ascended the bench, which, of all institutions, must be beyond reproach. It is the *unfit judge* who destroys the *confidence* of the man on the street.

Now, how does the unqualified reach the bench? Through politics!

Our candidates for the judiciary should not appear on the political ballot, nor should the political machine dominate the selection of judges.



Langdon W. Harris was born in Newfield, New Jersey, and admitted to the Pennsylvania Bar in 1924. He received his preparatory education at Cornell and his legal education at Temple University. He is the Chairman of the Committee To Support the Pennsylvania Plan for Selection of Judges, a committee of the Philadelphia Bar Association.

Judicial Ballots . . . *No Political Issues*

Why should a candidate for judge appear on a political ballot?

Political ballots should be reserved for candidates with political issues. Judges have no political issues. Their sole interest is the dispensation of justice between individuals or individuals and the state.

Frequently the ballot contains names of contentious candidates for political office with controversial issues that develop into a bitter and wrangling campaign. Should judicial candidates appear on the same ballot? They often seem to be subordinate to the other candidates, and may win or lose because of the issues, with their qualifications completely ignored.

Consider the voter and how helpless he is when confronted with a political ballot containing numerous candidates for political office and

(Continued on page 178)

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICES

1155 East Sixtieth Street.....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *Admission to the Bar*

It would be pure affectation to pretend that admission to the Bar is not a privilege. The protestations of those who say that upon admission a lawyer merely assumes duties have a hollow sound. Nevertheless the right to practice is too often treated as a gift bestowed on a favored group by a paternalistic government. Homer Crotty's article "Standards for Bar Examiners" in this issue gives instances of such treatment. Who could be so hardhearted as to deny to a young man who has fought three years in Korea admission to the Bar on the same terms as his fellows who have spent those years safely in a law school? Why should a state deprive the state university of one of the advantages of its status by requiring a second examination for admission to the Bar immediately after the passage of the examination for a diploma? The answer to both questions is, of course, that the concern of the bar examiners is not with the privileges of the applicants and the law schools, but with the rights of the public. We must reward our veterans and subsidize our educational institutions in ways which spread a known cost over the whole public. The veterans' exemption rewards them to the extent of the fees that they may exact from their clients and the diploma privilege subsidizes the local law schools to the extent of the tuition fees of students who are attracted by it; but the cost to the clients in each case is limited only by the bounds of their susceptibility to harm from unskillful service.

The standards that Mr. Crotty advocates are austere but austerity befits the novitiate of those to whom the defense of their fellows' life, liberty and property is entrusted. It is a serious business. We may deserve praise for shutting our eyes to bad records where we alone are concerned but there is nothing praiseworthy about licensing known criminals to represent the public as lawyers. As Mr. Crotty says, all applicants should be fingerprinted and all who prove to have recent serious criminal records should be eliminated. A boy who commits crimes at bar admission age cannot qualify for treatment as a youthful offender. Nor should there be any tenderness for the law schools. Part of their job is to train students so that they will pass bar examinations. The answer that they have more important things to do is unfounded. If a school proposes to make lawyers out of its students it has no more important task than to train them to pass bar examinations. The public is entitled to know how well the various schools fulfill this duty. Mr. Crotty is on sound ground in advocating the publication of the results of the graduates of each school, for purposes of comparison.

Austerity ought not to apply only to the treatment of candidates and law schools. An easy-going attitude toward bar examiners is as detrimental to the public weal as an easy-going attitude toward candidates and law schools. Treating the office of bar examiner as a plum to be handed out as political patronage is even worse than most forms of political patronage. An incompetent ward heeler appointed as a guardian in a particular case may do lots of harm in that case but one appointed as bar examiner does harm in all the cases handled by the incompetent lawyers that he permits to enter practice. Then too an incompetent bar examiner is quite as likely by inept questions to debar well-qualified men from practice. Mr. Crotty has suggestions for avoiding these and similar evils which merit consideration in every jurisdiction.

■ *Judicial Selection*

The Association's Committee on the Federal Judiciary has power under the by-laws, "on behalf of the Association, to promote the nomination and confirmation of competent persons for appointment as judges of courts of the United States and to oppose the nomination and confirmation of persons deemed by it to be not sufficiently qualified."

The Constitution of the United States enjoins upon the President the duty to "nominate and, by and with

the advice and consent of the Senate", to appoint " . . . judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for. . . ."

Day by day the Committee is more and more gaining the confidence of the President and his advisers. When the Chairman and his associates present their views, they are heard with respect by the Attorney General and members of the Senate Judiciary Committee; and again and again their advice has been accepted. For no one can gainsay their single-minded devotion to one lofty objective—the selection of those best qualified under the highest standards of character, intellect and experience to do honor to the high office of judge of a court of the United States.

It matters little whether the Federal Bench is occupied by Republicans or Democrats as long as they are selected solely for ability and character. There are many Republicans as well qualified as the best Democrat and many Democrats as able and honest as any Republican.

But political expediency should have no place in the determination of judicial fitness; and, thanks in no small measure to the tireless efforts of the organized Bar, it is becoming of less and less importance.

We present in this issue an interesting discussion by Ben R. Miller, a member of our Committee, telling of its work, its achievements and some of the obstacles to be overcome along the way.

In this issue, two other articles deal with the problem of judicial selection—Mr. Teller and Mr. Harris (see pages 137 and 142) discuss a modification of the American Bar Association's judicial selection plan.

Editor to Readers

It was encouraging to read the other day an excellent editorial in the *Toledo Blade* criticizing the press coverage of the Sheppard murder trial in Cleveland. It was suggested that perhaps the "case was sensationalized" to such an extent that it inspired a question as to how far freedom of the press can be carried before it interferes with fair trials.

Citing the sensational character of headlines, the editorial went on to discuss the *Blade's* philosophy as to the relation between "Free Press and Fair Trial". This is what was said, for which the paper was commended by the *Toledo Times*:

> After all, a fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of all human rights.
>
> From the dawn of civilization mankind has looked to it as the first line of defense against oppression under any form of government. Before the other powers of kings and tyrants were questioned, the right of courts to do justice between them and their subjects was demanded and sometimes accepted.
>
> In modern times even dictatorships, of the man on horseback or of a collectivized people, have at least pretended to keep their hands off the courts so that they could at least appear to hand down judgments according to the law and the evidence.
>
> And should American newspapers do less today?
>
> Their freedom of the press, gained in the last century or so as the democratic concept evolved, is not an absolute. It is much more like a social tool to be used wisely and responsibly for the public good. And newspapers employ it to their peril when they interpose themselves between the people and their courts and undertake to try cases in print before, or as, the evidence is presented to the jury.
>
> Incidentally, newspapers would be the first to protest if anybody else should attempt to obstruct justice in some such fashion.

Just before going to press, we received the sad news of the death of Governor John M. Slaton at the age of 88. He was one of our oldest and most loyal members. He joined our Association in 1916 and he became a member of the House of Delegates when it was first organized. He was still a member when he died on January 11. His friends in the Association were legion. Everyone who knew him not only entertained real affection for him, but greatly admired his courage and will not soon forget how he sacrificed his political future to do what he thought was right.

Make Your Hotel Reservation Now!

■ The Seventy-Eighth Annual Meeting of the American Bar Association will be held in Philadelphia from August 22 to August 26, 1955. Further information with respect to the schedule of meetings appears in this issue of the JOURNAL beginning at page 152.

Attention is called to the fact that many interesting and worthwhile events of the meeting will be arranged, as usual, to take place on Saturday and Sunday, August 19 and 20, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 22.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by a payment of $10.00 registration for *each lawyer* for whom reservation is requested. Be sure to indicate *three* choices of hotels and give us your definite date of arrival as well as probable departure date. *All space at the Bellevue-Stratford, the Headquarters Hotel, is exhausted.* Reservations will be confirmed approximately ninety days before the meeting convenes.

More detailed announcement with respect to the making of hotel arrangements may be found in the January issue of the JOURNAL at page 11.

World Government:

A Threat to the Constitution

by Ivan Bowen • *of the Minnesota Bar (Minneapolis)*

■ In the May, 1954, issue of the Journal, William W. Schwarzer and Robert R. Wood, of the California Bar, wrote on the subject: "Presidential Power and Aggression Abroad". Mr. Bowen, who is the President of the Hennepin County Bar Association, disagrees with Mr. Schwarzer and Mr. Wood; their point of view, he says, is that of the "internationalists". His own views on the subject were delivered in an address before the Iron Wedge Society (an honorary society at the University of Minnesota) from which this article is taken.

■ Nowhere in the world has the free play of individual opinion and action been more prevalent than in the United States of America. If we are to preserve these freedoms it is essential that there be a widespread understanding of the processes of government and the basic principles of human rights written into our Federal Constitution. Only through the leadership of men who have the opportunity of education and study can there be an informed public. Propaganda is a powerful weapon, and its common use by governments, international organizations and pressure groups requires a searching analysis if truth and candor are to direct public opinion.

Most of us have a fair understanding of our constitutional form of government. However, when it comes to the international obligations our country has assumed, we "see through a glass darkly". Let us look at what is happening in the international field and consider its impact upon our charter of freedom —the Constitution of the United States.

The League of Nations was a post-war project. It was thoroughly debated as a part of the Peace Treaty after World War I. Because of the fears of our people that it involved surrender of sovereignty or freedom to some extent, the United States stayed out of the League of Nations.

Those in this country who advocated the United Nations apparently sought to avoid extended debate and it was pushed through Congress while the attention of the people was concerned chiefly with winning World War II.

It was therefore nearly five years after the creation of the United Nations before students of government gave serious thought to the effect of the Charter of the United Nations upon our Government under the Constitution.

Our Constitution is not a legalistic document like a statute. It is a declaration of the freedom of the individual and a bulwark against encroachment by government upon rights of the citizen. It was the result of the declaration of the sovereignty of the United States of America pledged in lives, fortunes and sacred honor and redeemed in blood at Lexington and Concord, Valley Forge and Yorktown.

The Constitution of the United States is unique, for it came into existence under the Declaration of Independence recognizing "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed".

Mark the two phrases *"endowed by their Creator"* and *"deriving their just powers from the consent of the governed"*.

And yet we have those in this country who will argue that man has no rights stemming from "natural law".

It is elementary that our Federal Government is one of delegated powers and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Under the Constitution all legisla-

tive power is vested in Congress; the executive power in the President, and all judicial power in the courts.

This division of powers is at the heart of our republican form of government.

The President is given the power under Article II, Section 2, to make treaties by and with the advice and consent of the Senate, provided two thirds of the Senators present concur.

Article Six, Section 2 declares: " . . . all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land. . . ."

Until recently, treaties were largely contracts between the United States and another sovereign nation regarding foreign relations. Now we have created world organizations which strive to exercise sovereignty in their own right, such as the United Nations and its many specialized agencies. We have entered into multi-lateral treaties pledging the United States to go to war if any of the signatory countries are attacked.

Let me go back to an experience in the International Labor Organization (I.L.O.) That organization was an arm of the League of Nations to which the United States did not belong. The I.L.O. was created under the Treaty of Versailles. It is now a specialized agency of the United Nations.

By proclamation of the President pursuant to Joint Resolution of Congress in 1934, we entered into membership in the I.L.O. and subscribed to its constitution. I have checked the *Congressional Record* during the consideration by Congress of the resolution accepting membership in the I.L.O. and the debate was meager. It consisted largely of representation of the advocates that the I.L.O. was an annual meeting or assembly to discuss world labor problems.

I first gained knowedge of its real structure in 1938 when I was appointed an Adviser to the Industry Delegate from the United States to attend the Conference at the seat of the League of Nations in Geneva, Switzerland. On our way across the Atlantic, those of us who were neophytes were briefed on the I.L.O. by government representatives.

We learned that it was an agency of the League of Nations, that its office was in Geneva and that it operated under a constitution of its own.

The organization consists of:

(A) A General Conference meeting at least once a year and composed of four representatives of each of the member nations comprising two government delegates and one employer delegate, and one worker's delegate.

(B) A Governing Body of thirty-two persons, sixteen representing governments, eight representing employers and eight representing workers.

(C) An International Labor Office controlled by the governing body.

A Director-General appointed by the Governing Body is responsible for the conduct of the International Labor Office.

About sixty nations are members.

The Conference is essentially a legislative assembly functioning similarly to the Houses of our own Congress or legislatures through committees. In 1949 the Director-General in his Report said: "Today the role of the organization as an international parliament is generally recognized." Its actions take the form of what are termed conventions or recommendations and require a two-thirds vote cast by the delegates present for adoption.

As recommendations are what the name implies, we will limit our discussion to conventions.

Conventions are draft treaties submitted to member nations for acceptance. When adopted by any member nation they have the force and effect of treaties, and machinery is provided to make them effective. As heretofore stated under Article Six of our Constitution, treaties are "the supreme law of the land". How supreme is that?

John Foster Dulles, now Secretary of State, in an address before a regional meeting of the American Bar Association at Louisville, Kentucky, in 1952, said:[1]

> The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution, treaties become the supreme law of the land. They are indeed, more supreme than ordinary laws for congressional laws are invalid if they do not conform to the constitution—whereas treaty law can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President. They can take powers from the States and give them to the Federal Government or to some international body, and they can cut across the rights given the people by the constitutional Bill of Rights.

The United Nations and its many specialized agencies, including the I.L.O. and UNESCO, have spawned some two hundred conventions which, if adopted by the Senate by two thirds of the Senators present, will become the supreme law of the land. They cover every conceivable subject having to do with your daily life.

By acceptance of the Charter of the United Nations and the Constitution of the I.L.O. the treaty-making powers of the Executive were surrendered to these international world organizations, and likewise the legislative power of Congress and the states; neither the President nor the Department of State nor the Senate have anything to do with drafting or negotiating these conventions, nor does Congress in adopting them. However, the Government has assumed an obligation to transmit them to the Senate for ratification. Where in the Constitution is the authority to delegate to these world organizations the treaty-making or legislative power except in the treaty-supremacy clause?

Let's take a look at some of the hundred I.L.O. conventions that have been submitted to the United States for ratification, referring again to my experience at the International Labor Conference at Geneva, in 1938. Under consideration then was a proposed convention on

1. Editorial Note: On a later occasion, Mr. Dulles seems to depart from this theory.

road transport. It concerned the regulation of hours of labor and working conditions for employees in highway transportation throughout the world. We had federal and state laws on the subject in the United States. Yet the delegates in a world assembly, appointed and not elected, were proposing a treaty which if adopted by the Senate of the United States (not by both Houses of Congress) would become the supreme *law* of the land.

The titles of some of the other hundred conventions adopted by the I.L.O. disclose the field of domestic law in the United States they invade. For instance, conventions relating to:

1. Safety in the building industry.
2. Medical examinations of children employed in industry.
3. Freedom of association of employees and protection of the right to organize.
4. Regulation of night work of women employed in industry.
5. The setting up of a federal employment service (a controversial subject in the United States).
6. Labor clauses in public contracts.
7. Regulation of methods of payment of wages.
8. Government regulation of employment agencies.
9. Minimum wages in agriculture.
10. Holidays with pay in agriculture.
11. Social Security.
12. Government benefits for mother and child in maternity cases.

William L. McGrath, President of the Williamson Heater Company, of Cincinnati, who was an Adviser to the Employer Delegate to the I.L.O. in 1952, stated in his report on the Social Security Convention.

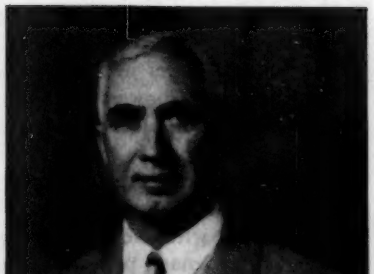
> The medical provisions of this Convention, scattered throughout the document with respect to its various "branches", constitute *in toto* a complete program of what we term in this country "socialized medicine".

These I.L.O. conventions, as well as most of the rest of the hundred adopted, deal purely with matters of domestic concern within the legislative prerogatives of our federal and state law-making bodies. While but a few have been ratified by the Senate, the United States has assumed a solemn obligation under the I.L.O. Constitution to approve them.

The Warsaw Convention . . . *Supreme over Domestic Law*

That conventions when adopted are treaties becoming the supreme law of the land can hardly be seriously disputed. As recently as November 9, 1953, the Supreme Court of the United States put its stamp of approval upon the Warsaw Convention as the supreme law of the land. The Warsaw Convention limits the liability of air carriers engaged in international transportation to 30,000 francs or $8,300 for death or injury. If a passenger on a plane destined for Seattle or Duluth is killed in a take-off crash at Wold Chamberlin Field in Minneapolis, recovery may be had in the sum of $17,500 under the Minnesota law. If another passenger on the same plane ticketed for Tokyo or Winnipeg is killed, recovery is limited to $8,300. There is now proposed a convention applying to international aircraft known as the Rome Convention which seeks to limit damages to surface property. If adopted it would apply to damages to residences and buildings such as occurred at Newark, New Jersey. The limitation would not apply if the damage was inflicted by an air carrier while engaged solely in domestic transport.

I am not disparaging the principle of limitation of liability. I am merely pointing out that treaty law is supreme over domestic law. As Mr. Dulles declared, treaties "can take powers away from the States and give them to some international body. They can cut across the rights given the people by the Constitutional Bill of Rights." The latter principle was the basis of the late Chief Justice Vinson's dissent in the steel seizure case contending that the President was empowered by the United Nations charter to confiscate private property. He was joined by two Justices.



Chase

Ivan Bowen became President of the Hennepin County Bar Association last July. A member of the Minnesota Bar since 1911, he is a former Chairman of the Section of Public Utility Law of the American Bar Association and a former member of the House of Delegates.

The I.L.O. is now a specialized agency of the United Nations. And we have assumed further obligations under the Charter of the United Nations as a treaty, not the least of which are financial. Let's consider some of these.

How did we get into the war in Korea? The question is not as to why, but how.

The Constitution places the war power in Congress.

Former President Harry S. Truman recently stated: "My action in sending troops into Korea was in support of the United Nations."

The youth of this country were drafted to serve in that bloody Korean conflict on the theory it was not a war requiring congressional declaration. Yet a court recently held that it was a war for the purpose of a court-martial proceeding involving the death penalty against a G.I. charged with sleeping on sentry duty.

What about the NATO treaties, the recent Korean treaty and the other mutual security pacts?

The State Department is now engaged in plans for a mutual security

pact in Asia similar to NATO. So let's see what obligations we are assuming. These mutual security pacts are new in nothing but the name. They are the old "balance of power" treaties that have made Europe a battlefield for centuries and were the port of entry of Great Britain for World Wars I and II.

There are twelve nations signatory to the North Atlantic Treaty. They are the United Kingdom of Great Britain and Northern Ireland, Portugal, Norway, The Netherlands, Luxembourg, Italy, Iceland, France, Denmark, Belgium, Canada and the United States. It was signed April 4, 1949. Later Turkey and Greece became parties.

Article 5 of the North Atlantic Treaty provides:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Article 6 states:

> For the purpose of Article 5 an armed attack on one or more of the Parties is deemed to include an armed attack on the territory of any of the Parties in Europe or North America, on the Algerian departments of France, on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties.

Article 11 requires:

> This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes. . . .

The treaty was ratified by the Senate, which made it effective for the United States as "the supreme law of the land". The power of Congress to "declare war" was thus by-passed.

Secretary of State Dulles, at a press conference in Washington on March 16, 1954, in reply to a question stated:

> It is my opinion that the provisions of the treaty, which state that an attack upon one of the allies is the same as an attack upon all—or in other words that an attack upon one of our allies is the same as an attack upon the United States—and that is also, I may say, in the Rio Pact—that gives the President of the United States the same authority to react as he would have if the United States were attacked. [U. S. News and World Report March 26, 1954]

That means we go to war without action by Congress whenever one of the other member nations of NATO is attacked.

This is the effect of the treaty-supremacy clause of our Constitution, for as Mr. Dulles said at Louisville, Kentucky, treaties "can take powers away from Congress and give them to the President".

But the paradox of Mr. Dulles' declarations cannot be accepted as a mere tug-of-war between constitutional powers of the executive and Congress. Their powers were delegated, not assumed, and the Constitution gives the war power to Congress and not to the Executive and the Senate.

One of the bitterest struggles over the adoption of the Constitution revolved around the war power (control of the Armed Forces and standing armies). Only the genius of Alexander Hamilton succeeded in allaying the fears of the people of New York on this issue by pointing out that the power was lodged in the hands of representatives in Congress elected by the people under the Constitution. Mr. Hamilton himself had advocated in the Constitutional Convention giving power to declare war to the Senate:

> A stranger in our politics, who was to read our newspapers at the present juncture, without having previously inspected the plan reported by the convention, would be naturally led to one of two conclusions; either that it contained a positive injunction, that standing armies should be kept up in time of peace: or that it vested in the Executive the whole power of levying troops, without subjecting his discretion, in any shape, to the control of the legislature.
>
> If he came afterwards to peruse the plan itself, he would be surprised to discover, that neither the one nor the other was the case; that the whole power of raising armies was lodged in the Legislature, not in the Executive; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected; and that instead of the provision he had supposed in favor of standing armies, there was to be found, in respect to this object, an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of any army for any longer period than two years—a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity. [The Federalist No. XXIV—Eleventh Volume, Page 188].

War in the world is no more imminent now than it was then—although it may be deadlier. We have always abhorred the destruction resulting from war, but the American people have likewise feared the concentration of power in government officials. As Thomas Jefferson was quoted by John W. Davis in his argument in the Supreme Court in 1953 opposing the Executive power of seizure in the steel case, "In questions of power let no more be said of confidence in man: Bind him down from mischief by chains of the Constitution".

A Minor Offense . . . *A Five-Year Sentence*

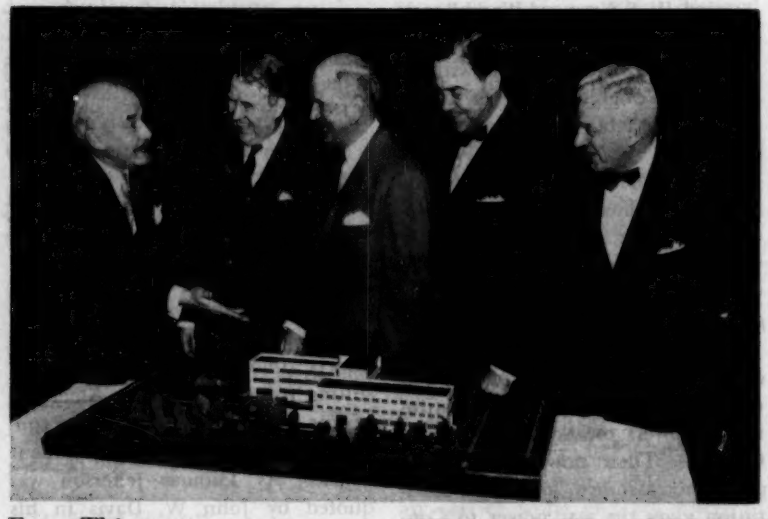
Other treaties which have subordinated specific provisions of the Constitution to the treaty supremacy clause include the "Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty".

(Continued on page 177)

Two-Year Bar Center Campaign To Close

▪ A final surge this month is expected to put the "bricks and mortar" finance drive at $1,675,000 as the emphasis shifts to long-range development.

▪ Reappraisal of the American Bar Center initial financing needs by the Executive, Building, Research and Library, and Finance Committees of the American Bar Foundation following the Annual Meeting last August disclosed that while the overall so-called "bricks and mortar" campaign goal of $1,500,000 had been exceeded by 3½ per cent ($55,000), an additional amount would be required before it could be said with justifiable pride that everything was "paid for".



From This . . .

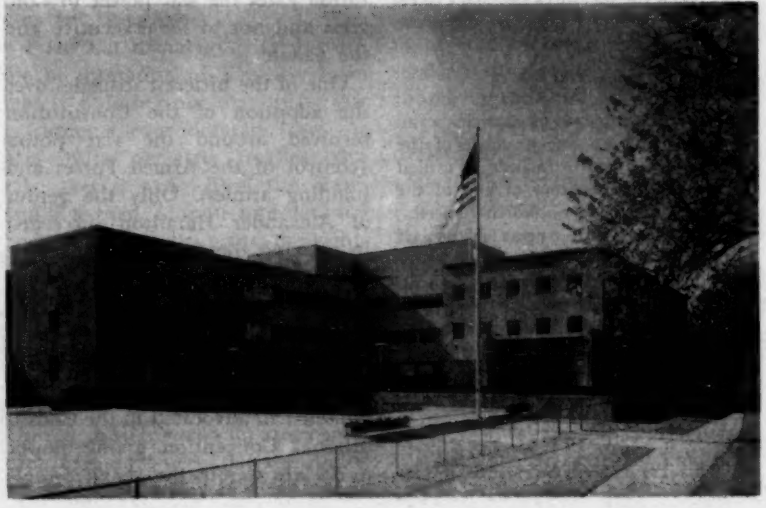
The late George Maurice Morris shows key officers of the American Bar Foundation an architect's model of the Bar Center at a meeting in Chicago two years ago this month. (Left to right: Mr. Morris, David F. Maxwell, Robert G. Storey, Allan H. W. Higgins and Roy E. Willy.)

Despite extraordinarily careful and superior management and supervision by the Building and Executive Committees, the American Bar Center did not escape the bugaboo of construction changes, additions and alterations. They were kept at a remarkable minimum, but they found their way into the liability side of the ledger as "extras".

We underestimated at the outset not only the probable per centum of expense involved in fund raising, but also the period of time during which the fund campaign would necessarily run.

The cost of furnishings and equipment somewhat exceeded original estimates.

And there was the factor of need for temporary financing of research activities for the one and one-half years which the Special Committee on Permanent Financing estimates will be needed to get the permanent



. . . To This

The completed American Bar Center as it appears today, two years after the fund-raising drive began.

financing program into operation.

These, as well as other circumstances affecting our financial needs, led the Executive and Finance Committees to set the goal finally at $1,675,000, rather than the initial "bricks and mortar" estimate and campaign goal of $1,500,000, which must be raised before it can be said that everything is "paid for". With that, we went to work once again.

We have raised $100,000 of the additional amount. We must raise $75,000 more by the time of the Mid-year Meeting.

Then there were the states that had not raised their initial campaign quotas. Leaders of the Bars of those states requested an opportunity to work to bring their states into the select 100 per cent circle. The Executive and Finance Committees decided to accord them the opportunity even though it was known that in those states the ratio between campaign expense and funds raised would be somewhat disproportionate.

But no fund-raising effort can go on forever. Regardless of good intentions and spirit, workers tire and enthusiasm lags. Old Man Expense grows with each passing week. The specter of permanent financing tugs daily at our coat-tails for attention.

So, we fixed the Mid-year meeting in Chicago, February 22, as the date for closing the nationwide campaign.

On that day the Roll of Builders, the beautiful permanent scroll in the Charles Evans Hughes Memorial Lobby, on which are listed the names of all who have contributed to the building and launching of the American Bar Center, will be closed.

On that day the list of states in the order of their success in reaching their campaign quotas will be closed and posted. (Twenty-one states and one territory are over 100 per cent of quota. A subsequent issue of the JOURNAL will carry the final standings.)

As for the future, the Finance Committee is completing its recommendations for permanent financing. That program will be ready for submission to the House of Delegates at the Annual Meeting in Philadelphia in August.

Right now, though, let's hang up that "paid-in-full" sign for all the world to see on February 22.

ALBERT E. JENNER, JR.

ASSOCIATION CALENDAR

MIDYEAR MEETING

Edgewater Beach Hotel, Chicago, Illinois

Board of Governors	February 18 and 19, 1955
Committees and Councils of Sections	February 19 and 20, 1955
House of Delegates	February 21 and 22, 1955

REGIONAL MEETINGS

Phoenix, Arizona	April 13-16, 1955
Cincinnati, Ohio	June 8-11, 1955
Minneapolis, Minnesota	October 12-15, 1955
New Orleans, Louisiana	November 27-30, 1955
Hartford, Connecticut	April 15-18, 1956

States Included

PHOENIX	(Pacific Southwestern Regional Meeting)—Arizona, California, Colorado, Nevada, New Mexico and Utah
CINCINNATI	(Big Seven Regional Meeting)—Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee and West Virginia
MINNEAPOLIS	(Northwestern Regional Meeting)—Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wisconsin
NEW ORLEANS	(Deep South Regional Meeting)—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas
HARTFORD	(Northeastern Regional Meeting)—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont

BOARD OF GOVERNORS MEETING

Mayflower Hotel, Washington, D. C. — May 16 and 17, 1955

ANNUAL MEETINGS

Philadelphia, Pennsylvania (Bellevue-Stratford – Headquarters)	August 22-26, 1955
Dallas, Texas	August 27-31, 1956

American Bar Association:

Seventy-Eighth Annual Meeting

First Announcement of Program
Philadelphia, August 22-26, 1955

President's Reception A General Reception will be held in honor of President and Mrs. Wright (time and place to be announced).

The Assembly The opening session will be held Monday, August 22, at 10:00 A.M. in the Forrest Theatre. There will be a luncheon honoring Chief Justice John Marshall Wednesday noon, August 24, followed by an Assembly Session (second) on the new Independence Mall for all members, their wives and guests in attendance at the meeting. The third session will be held Thursday, August 25, at 2:00 P.M., in the Forrest Theatre. The Annual Dinner (fourth Assembly session) is scheduled to be held Thursday evening, August 25, at 7:30 P.M., in the Ballroom of *The Bellevue-Stratford Hotel*. The fifth session will be held immediately following adjournment of the final session of the House of Delegates in the Ballroom of *The Bellevue-Stratford Hotel*.

House of Delegates The House of Delegates will meet in the Ballroom of The Bellevue-Stratford Hotel at 2:00 P.M., Monday, August 22; 9:30 A.M. and 2:00 P.M, Tuesday, August 23; 9:30 A.M., Wednesday, August 24; 9:30 A.M., Thursday, August 25; 9:30 A.M., Friday, August 26.

Section Meetings in Philadelphia

Administrative Law (Saturday, Sunday, Monday and Tuesday, August 20, 21, 22 and 23)

The Warwick The Council will meet Saturday afternoon and all day Sunday. Regular sessions of the Section will be held at 2:00 P.M. on Monday and 10:00 A.M. and 2:00 P.M. on Tuesday.

Antitrust Law (Monday, Tuesday and Wednesday, August 22, 23 and 24)

Hotel Adelphia The Council will meet at 2:00 P.M., Monday. Regular sessions of the Section will be held at 10:00 A.M., Tuesday and 10:00 A.M., Wednesday. A luncheon is tentatively scheduled for Wednesday noon.

Bar Activities (Saturday, Sunday, Monday and Wednesday, August 20, 21, 22 and 24)

The Bellevue-Stratford Hotel The Committee on Award of Merit will meet at 12:00 noon on Saturday. A meeting of the Council has been scheduled for 9:00 A.M., Sunday. Regular sessions of the Section will be held at 2:00 P.M., Monday and 10:00 A.M., Wednesday.

Corporation, Banking and Business Law (Sunday, Monday and Tuesday, August 21, 22 and 23)

The Bellevue-Stratford Hotel The Council will meet at 10:00 A.M. and 2:00 P.M. on Sunday. The general sessions of the Section will be held at 2:00 P.M. on Monday, and 10:00 A.M. and 2:00 P.M. on Tuesday. The time and place of the meeting of the Division of Food, Drug and Cosmetic Law will be announced later.

Criminal Law (Monday, Tuesday and Wednesday, August 22, 23 and 24)

Union League Club Regular sessions of the Section will be held on Monday afternoon, Tuesday morning and afternoon and Wednesday morning.

Insurance Law (Sunday, Monday, Tuesday and Wednesday, August 21, 22, 23 and 24)

The Benjamin Franklin The Officers, Members of Council and Committee Chairmen will meet at a luncheon at 12:00 M., Sunday. Various Committee breakfast meetings have been scheduled for Monday and Tuesday at 8:00 A.M. each day. A luncheon will be held at 12:00 M., Monday, followed by a regular session of the Section at 1:30 P.M. Regular sessions of the Section will be held at 9:30 A.M. and 1:30 P.M. on Tuesday. A reception and dinner dance have been scheduled for Tuesday evening. A regular session of the Section will be held Wednesday at 9:30 A.M.

International and Comparative Law (Sunday and Tuesday, August 21 and 23)

The Council will meet at 10:00 A.M. and 2:00 P.M., and the Advisory Committee at 4:00 P.M., Sunday.

The joint breakfast of the Comparative Law Division and the American Foreign Law Association is scheduled for 8:00 A.M., Tuesday. Regular sessions of the Section will be held at 10:00 A.M. and 2:30 P.M., and a meeting of the new Council is scheduled for 4:00 P.M., Tuesday. All of the above functions will be held at *The Bellevue-Stratford Hotel*. A joint luncheon with the Junior Bar Conference is scheduled for Tuesday at 12:30 P.M. at the *Union League Club*.

Judicial Administration (Sunday, Monday, Tuesday, Wednesday and Thursday, August 21, 22, 23, 24 and 25)

The Bellevue-Stratford Hotel The Council will meet at 10:00 A.M., Sunday. At 12:30 P.M. on Monday there will be a luncheon for Federal Judges followed by a regular session of the Section at 2:00 P.M. The Annual Dinner in honor of the Judiciary of the United States is scheduled for 7:30 P.M., Monday. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M., Tuesday. A luncheon for State Judges has been scheduled at 12:30 P.M., Tuesday. The meeting of the Committee on Cooperation with Laymen has been scheduled at 10:00 A.M., Wednesday. The final session of the Section will be held at 10:00 A.M., Thursday.

Junior Bar Conference (Friday, Saturday, Sunday, Monday and Tuesday, August 19, 20, 21, 22 and 23)

The Board will meet from 10:00 A.M. to 5:00 P.M. on Friday. Regular sessions of the Conference will be held at 9:30 A.M. and 2:00 P.M. on Saturday and at 9:30 A.M. on Sunday. The meetings of the Nominating Committee, Awards of Merit Committee and Resolutions Committee will be held at 10:00 A.M., Saturday. Arrangements are being made for a dinner dance Saturday evening. A luncheon has been scheduled for 12:30 P.M. on Sunday. A Workshop Meeting of Affiliated Groups will be held at 2:00 P.M., Sunday. All of the above functions will be held at the *Hotel Sylvania*. A debate and reception sponsored by the Conference on Personal Finance Law will be held at 4:00 P.M., Monday (place to be announced). A joint luncheon with the Section of International and Comparative Law will be held at 12:30 P.M. in the *Union League Club* on Tuesday.

Labor Relations Law (Sunday and Tuesday, August 21 and 23)

The Drake The Council will meet at 10:00 A.M., and 2:00 P.M. on Sunday. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Tuesday. A luncheon has been scheduled for 12:30 P.M., Tuesday.

Legal Education and Admissions to the Bar joint sessions with **National Conference of Bar Examiners** (Saturday, Sunday, Monday and Tuesday, August 20, 21, 22 and 23)

The Bellevue-Stratford Hotel The Section Council will meet at 10:00 A.M. on Saturday, and 10:00 A.M. and 2:00 P.M. on Sunday. The Section will hold joint meetings with the National Conference of Bar Examiners at 2:00 P.M. on Monday, and 10:00 A.M. on Tuesday. A joint luncheon has been scheduled for 12:15 P.M. on Tuesday. The Annual Meeting of the Section will be held at 2:00 P.M. on Tuesday.

Mineral Law (Sunday, Tuesday and Wednesday, August 21, 23 and 24)

Hotel Adelphia The Council and Committee Chairmen will meet at 4:00 P.M. on Sunday. The regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M., Tuesday, and 10:00 A.M., Wednesday. A reception has been scheduled for 6:00 P.M., Wednesday at *The Bellevue-Stratford Hotel*.

Municipal Law (Sunday, Monday and Tuesday, August 21, 22 and 23)

The Barclay The Council will meet for breakfast at 8:00 A.M., Monday. The regular sessions of the Section will be held at 2:00 P.M., Sunday, 2:00 P.M., Monday and 9:30 A.M. and 2:00 P.M., Tuesday. A meeting of the new Council will be held at 5:30 P.M., Tuesday.

Patent, Trade-Mark and Copyright Law (Friday, Saturday, Sunday, Monday, Tuesday and Wednesday, August 19, 20, 21, 22, 23 and 24)

The Warwick The Council and Committee Chairmen will meet at 2:00 P.M., on Friday. The International Patent and Trade-Mark Association will meet at 10:00 A.M. (tentative) and a Symposium on Copyrights will be held at 2:00 P.M. on Saturday.

Chalfonte-Haddon Hall, Atlantic City, New Jersey The United States Trade-Mark Association luncheon and a Symposium on Trade-Marks will be held on Sunday (time to be announced).

The Warwick The National Council of Patent Associations will hold a breakfast at 8:00 A.M. on Monday. The regular sessions of the Section will be held at 2:00 P.M., Monday, 9:30 A.M. and 2:00 P.M., Tuesday, and 9:00 A.M., Wednesday. A luncheon for the International Patent and Trade-Mark Association has been scheduled for 12:30 P.M., Tuesday. Arrangements are being made for a reception and dinner to be held Tuesday evening.

Public Utility Law (Sunday, Monday, Tuesday and Wednesday, August 21, 22, 23 and 24)

The Barclay The Council will meet at 2:00 P.M. on Sunday. Regular sessions of the Section will be held at 2:00 P.M., Monday, 10:00 A.M. and 2:00 P.M., Tuesday, and 10:00 A.M., Wednesday. There will be a luncheon meeting for Council members and guest speakers at 12:30 P.M., Tuesday. A dinner dance has been scheduled for 7:30 P.M., Wednesday.

Real Property, Probate and Trust Law (Monday, Tuesday and Wednesday, August 22, 23 and 24)

Hotel Adelphia A luncheon meeting for Council members will be held at 11:00 A.M., Monday. The Division meetings will be held at 2:00 P.M., Monday, 9:30 A.M. and 2:00 P.M., Tuesday, and 9:30 A.M., Wednesday. There will be a breakfast meeting for Officers, Council members and members of Section Committees at 8:00 A.M., Tuesday. Arrangements are

being made for a dinner Tuesday evening (time and place to be announced).

Taxation (Thursday, Friday, Saturday, Sunday, Monday, Tuesday and Wednesday, August 18, 19, 20, 21, 22, 23 and 24)

The Benjamin Franklin The Officers and Council will meet in executive session at 9:30 A.M. and 2:00 P.M., Thursday. On Friday at 9:30 A.M. and 2:00 P.M. there will be a meeting of the Council and Committee Chairmen. Regular sessions will be held at 10:00 A.M. and 2:00 P.M., Saturday, and 10:00 A.M. and 2:00 P.M., Sunday. The Section luncheons are scheduled for Saturday and Sunday at 1:00 P.M. Arrangements are being made for a reception and dinner dance to be held Saturday evening at the *Philadelphia Country Club*. Regular sessions of the Section will be held at 2:00 P.M., Monday, and 10:00 A.M. and 2:00 P.M., Tuesday, at *The Bellevue-Stratford Hotel*. A special session on State and Local Tax Problems will be held at 9:30 A.M. on Wednesday at *The Benjamin Franklin*.

(Completed programs will appear in the Advance Program for the Philadelphia meeting.)

Note: In accordance with a recent policy adopted by the Board of Governors, all luncheon meetings of law school alumni, legal fraternities and legal sororities are to be scheduled for Thursday and Friday, August 25 and 26.

Views of Our Readers

(*Continued from page 110*)

Democrats favored the Amendment, three Democrats and two Republicans did not.

The non-"political" character of the Amendment is further attested by the actual voting in the Senate on both the "Bricker" and the "George" proposal. Twenty-eight Republicans and fourteen Democrats voted for the "Bricker" Amendment, seventeen Republicans and thirty-three Democrats voted against, with two Republicans and two Democrats not voting. On the "George" Amendment, thirty Republicans and thirty Democrats voted for it and fifteen Republicans and sixteen Democrats against it, with one Republican and three Democrats not voting.

With such a record no one can say that the "Bricker" Amendment was or is "political" in the partisan sense. There has scarcely ever been an issue in the U.S. Senate upon which a more non-political or non-partisan record has been made. No one in the course of the Senate proceedings even suggested that the Amendment was a "political" issue.

FRANK E. HOLMAN
Seattle, Washington

An Additional Note on Antitrust Developments

■ After my article [entitled "Antitrust Developments: A New Era for Competitive Pricing", beginning in this issue at page 117], had been set in type Judge Medina's opinion in *Dictograph Products, Inc.* v. *Federal Trade Commission* was reported. 23 U.S.L.W. 2293 (2d Cir., December 15, 1954).

Judge Medina ruled that the exclusive dealing arrangements were illegal *per se*. The opinion is startling in two respects. First, the court purported to follow the letter of the *Standard of California* decision, categorically rejecting the "rule of reason" approach. It thus overlooks the *Richfield* decision and ignores the recent trend of the Supreme Court away from the *Standard of California* rationale, exemplified by the *Motion Picture Advertising* case and particularly Justice Frankfurter's dissenting opinion therein, and it is in direct conflict with the Federal Trade Commission's recent *Maico* opinion. Second, Judge Medina attempted to rely on legislative history as showing that the qualifying phrase "where the effect . . . may be to substantially lessen competition or tend to create a monopoly" was not intended to allow an inquiry into all economic factors in all exclusive dealing cases.

Judge Medina relies on some legislative history to arrive at a conclusion which does violence to recognized principles of statutory construction. The Judge's error lies in concluding that since an example given in the legislative discussion to prove the necessity for some general "rule of reason" language involved newcomers and small business enterprises, that therefore only a newcomer or a small business could rely on the qualifying clause. This distorted conclusion from the legislative history results in a dual standard: a *per se* approach where the larger segments of the industry are concerned but a "rule of reason" approach where newcomers or smaller organizations are concerned. Such a strange decision will not commend itself to students of the subject and may do considerable harm by delaying, longer than hitherto hoped, the time when lower courts, generally, use the "rule of reason" approach, in the manner indicated by the Supreme Court and the Federal Trade Commission.

Shortly after the *Dictograph* decision, the Seventh Circuit Court of Appeals handed down its ruling in *Anchor Serum Company* v. *Federal Trade Commission*, CCH Trade Reg. Rep., Par. 67,921 (1954), wherein the court, although disclaiming a *per se* approach to exclusive dealing, was misled by the "substantiality" test of the *Standard of California* decision and seems to have used a *per se* technique in spite of its definite assertion that it was not doing so.

THOMAS E. SUNDERLAND
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Books for Lawyers

PHILADELPHIA BAR ASSOCIATION'S 150th ANNIVERSARY VOLUME. *Published in a limited edition by the 150th Anniversary Committee. Philadelphia. 1954.*

A little more than a century ago, Comte de Tocqueville, in the first part of his monumental work *De la démocratie en Amérique,* assessed the role of the lawyer in the United States, then barely forty-five-years old.

His comments and observations have a special significance in connection with the issuance of a two-volume set dealing with the events of the centenary and sesquicentennial celebrations of the Philadelphia Bar Association, believed by competent authorities to be the oldest organized Bar in the English-speaking world.

He says, "The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy, and which can be advantageously and permanently combined with them. I am not unacquainted with the defects which are inherent in the character of that body of men, but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained, and I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

The record of *The Philadelphia Lawyer* as presented in the two handsomely printed and bound volumes (George H. Buchanan Company, Philadelphia) shows him fulfilling with distinction, urbanity, courage and high purpose the role which de Tocqueville felt only members of the legal profession could play in our democratic society, and serves to confirm the shrewdness and soundness of his observations. Certainly the power of the people in the United States has increased tremendously since de Tocqueville's day, and it is reassuring to know that the tradition of public service, which from the beginning has characterized the legal profession in this country, has expanded and strengthened commensurately as is amply demonstrated in the Anniversary volumes. We see the lawyer here in his three principal capacities: serving his clients, the courts and administration of justice, and with increasing effectiveness that larger public, the community.

While not a formal history, the two volumes contain in the commemorative addresses and papers of the distinguished lawyers and judges who took part in the Anniversary events and in the various exhibits and documents, a wealth of valuable information and data relating to the life of the lawyer in one of the great centers of law since pre-Revolutionary days. Much of the material is presented through the first-hand recollection of men famed at the Bar, who were witnesses to what they reported, and is not readily available elsewhere. One of the principal merits of the work is that the addresses and papers are published in full (in the 150th Anniversary Volume, together with an exact record of the proceedings), so that we may know precisely what occurred and what was said without having the information filtered through an observer or editor.

The address of the late Mr. Justice Jackson of the United States Supreme Court, "The Genesis of an American Legal Profession", delivered as the highlight of the Commemorative Exercises in the Academy of Music, March 13, 1952, is a noteworthy contribution to legal scholarship. Future historians will be grateful that it is here preserved for their use.

Among those whose contributions add great interest to the contents of the 150th Anniversary Volume is Leonard W. Brockington, C.M.G., Q.C., distinguished Canadian barrister and Rector of Queens College, who divided the honors of the anniversary dinner with our own George Wharton Pepper. Mr. Brockington spoke as a dear friend of many present who recalled another splendid contribution he made in Philadelphia to the meeting of the American Bar Association in 1940 which helped to bring together our own country and the many units of the British Empire in the common cause in which we all eventually joined—defense of the peace of the world.

Also worthy of preservation is the sermon of the Most Rev. John F. O'Hara, C.S.C., D.D., Archbishop of Philadelphia, given during the celebration of the Red Mass or Mass of the Holy Spirit in the Cathedral of SS. Peter and Paul on March 12, 1952—a brilliant exposition of "The Natural Law", as the basis and authority for man-made law. The Red Mass traditionally is celebrated in England at the opening of the judicial and parliamentary year. It takes its name both from the color of the vestments worn by the clergy and from the red robes which are the usual court attire of the English judges.

In any volume dealing with the legal profession in Philadelphia the reader would expect to find a major contribution from the dean of that Bar, one of America's most distinguished lawyers, former U. S. Senator George Wharton Pepper. Happily in the 150th Anniversary Volume, Senator Pepper makes two appearances: first, at the commemorative dinner where he shares the rostrum with Mr. Brockington, and also at the fi-

nal bar association meeting of the Anniversary year where he was both principal speaker and guest of honor. His remarks on both occasions were eloquent and meaningful, combining humor and wisdom with lofty sentiment. Senator Pepper not only is a scholar and keen student of the law particularly as it relates to the "Philadelphia Lawyer" (whom he personifies), but as a practicing attorney for more than sixty years his personal recollection embraces many of the significant happenings and prominent personages of the Association's eventful history.

The principal commemorative exercises of the 150th Anniversary year were held on March 13, 1952, at the Academy of Music. This was the date on which, 150 years earlier, seventy "Attornies and Counsellors-at-law" of the City of Philadelphia signed articles of association for the purpose of procuring a charter. This charter is now the property of the Philadelphia Bar Association. In a brilliant address of welcome to the more than 2500 lawyers, teachers and students of law, distinguished representatives of the official, cultural, civic, business and religious life of the community who attended, Bernard G. Segal, Chancellor of the Association, set the tone for the celebration.

In addition to Justice Jackson and Chancellor Segal, speakers at the Academy of Music included: Arthur Littleton, then the immediate past chancellor of the Association; Edward J. Fox, Jr., president of the Pennsylvania Bar Association; and Howard L. Barkdull, President of the American Bar Association.

The text of the scholarly presentation of Arthur Littleton will be of particular interest to students because of the research into the early history of the legal profession in the area once known as the Delaware River territory, now included in the States of Pennsylvania, Delaware and New Jersey.

Mr. Fox discusses the influence of the lawyer on private, corporate and public affairs and offers recommendations for making that influence more effective.

Mr. Barkdull pays tribute to the important role Philadelphia lawyers have played in the work of the nation's organized Bar, noting that four Philadelphia lawyers have served as presidents of the American Bar Association—Francis Rawle, Walter George Smith, Hampton L. Carson and Joseph W. Henderson. He also traces the history of the American Bar Association from its beginnings in 1878 to its present pre-eminent position as a spokesman for the American legal profession.

For the layman and lawyer alike, perhaps the most lasting impression of the anniversary year will be the recollection of the simultaneous exhibition held by the city's great educational and cultural institutions, its museums, historical and learned societies, devoted to the general subject: "The Bench and Bar of Philadelphia". This marked the first time that such institutions as The American Philosophical Society, the Historical Society of Pennsylvania, the Museum of the University of Pennsylvania, the Atwater Kent Museum, the Free Library of Philadelphia, the Pennsylvania Academy of the Fine Arts, the University of Pennsylvania Law School and the Sullivan Memorial Library of Temple University Law School had pooled their resources in offering simultaneous exhibitions. Many historical treasures were placed on public display for the first time. Originally scheduled to last from March 1 to April 1, the exhibition was extended to April 30 because of the interest shown by the citizens of Philadelphia.

A handsome, twenty-two-page brochure, describing the exhibits and containing photographic reproductions of some of the historical treasures, was printed by the Anniversary Committee and 10,000 copies were distributed to educational institutions and the public. This brochure has been reproduced through halftones and forms an attractive part of the 150th Anniversary Volume. Also included is the presentment made to the American Bar Association on the basis of which the Philadelphia Bar Association, as a fitting highlight of the Anniversary year, received the Association's 1952 Award of Merit for the "most constructive and outstanding work" among local bar associations in cities of 100,000 or more. The presentment, covering twenty-five printed pages, is a succinct synopsis of the multiple activities of the organized Bar in Philadelphia during the eventful Anniversary year.

The 150th Anniversary Volume contains numerous illustrations, including photographs of "Old Philadelphia" depicting public buildings, law offices, courtrooms and other scenes of interest to those who have a curiosity concerning the surroundings in which Philadelphia lawyers practiced their profession in other times.

The 100th Anniversary Volume is a reprint of the original book, published in 1906. It contains the texts of the addresses delivered by Samuel Dickson, Chancellor of the Law Association of Philadelphia (which later became the Philadelphia Bar Association), and of the Honorable James T. Mitchell, then Chief Justice of the Supreme Court of Pennsylvania, delivered on March 13, 1902, at exercises in Horticultural Hall, Philadelphia. It also contains, at the suggestion of the Publications Committee, five papers prepared by request of the Committee: "Some Recollections of the Bar of Fifty Years Ago", by John C. Bullitt; "Reminiscences of the Bar", by Clement B. Penrose, Judge of the Orphans Court of Philadelphia County; "Some Recollections", by William Roth Wister; "John Cadwalader's Office", by John Samuel; and "Sketch of George M. Wharton", by Henry E. Busch. Invaluable are the sketches of Mr. Wister, Mr. Samuel and Mr. Busch, revealing as they do some of the methods of instruction practiced in leading law offices in Philadelphia about the middle of the ninteenth century.

In addition to the contributions of Horace Binney, there is republished in the Centenary Volume "A Memoir of William Rawle, LL.D.," by

Thomas L. Wharton, with a letter from Peter Stephen Duponceau to the author, containing his recollections of Mr. Rawle's life and character; a "Eulogium on the Life and Character of Horace Binney", by William Strong; a paper read before the Pennsylvania Bar Association upon William Morris Meredith, on June 26, 1901, by R. L. Ashhurst and an address containing a historical sketch of the Law Association of Philadelphia, read by John Samuel at the installation of the Law Library in City Hall.

Also included are valuable reference materials, including the charter and first by-laws of the Law Library Company; the by-laws adopted in 1805; the Constitution, by-laws, officers and members of the Associated Members of the Bar of Philadelphia; the Charter of the Law Association of Philadelphia, as amended in 1860 and 1901; the by-laws of the Law Association of Philadelphia, as amended to March 5, 1901; standing resolutions of the Law Association of Philadelphia, 1902; a list of officers of the Law Library Company from 1802 to 1827; officers and members of standing committees of the Law Association from 1827 until 1902; and officers, committees and members of the Law Association of Philadelphia as of March 13, 1902. There are 468 pages and eleven illustrations of noted judges and lawyers.

The set is composed of a limited edition of 3000 copies of the 150th Anniversary Volume, together with 3000 reprints of the companion 100th Anniversary Volume.

Philadelphia lawyers who have a feeling of kinship with, and reverence for, the past, who take pride in their affiliation with a Bar so rich in tradition and achievement, will want to own this work.

OWEN J. ROBERTS
Philadelphia, Pennsylvania

FICTION GOES TO COURT. *Edited by Albert P. Blaustein. New York: Henry Holt & Co. 1954. $4.00 Pages xii, 303.*

The amenities, I suppose, demand that I say a general word about this book before I indulge in a little personal enthusiasm of my own. Anyway, the reader would not understand my personal predilections unless I first told the method pursued in producing the work. And so I shall say right at the outset that no spare moment after my first few glances at Mr. Blaustein's product was spent thereafter in doing anything but going on reading. It is hard to see how I can provide a more succinct appraisal than the one that results from so pragmatic a test. (I was about to write "such a" pragmatic test but suddenly recalled the intense aversion to the word "such" that the Editor of this JOURNAL entertains, unless the writer is driven *vi et armis* to its use.)

The method of the book is this: a number of lawyers (a term to be hereinafter discussed) all over the country (with one side-trip to Britain) were asked to name their favorite short story having to do with lawyers and the law and to write a short paragraph explaining their choices. The results have been collected into a volume of eighteen such tales—which leads me to wonder how many more were invited to express their preferences and then either neglected to reply or sent in such inappropriate selections as to suffer the penalty of editorial rejection. I must admit that one or two of those included might well have suffered the same penalty, but even they are not sufficient to impede the steady flow of pleasure that comes from reading the book from cover to cover. Even those one or two justify their inclusion as a basis for comparing the others.

Perhaps now a sufficient idea of the book as a whole has been given to permit me, before going into more detail, to describe the personal reaction to which I have alluded. Having grasped the general plan, I turned with interest to discover what choices had been made. I was delighted to see that the book led off with John W. Davis's selection of "The Corpus Delicti" by Melville Davisson Post. Now, I had always wanted to find a common ground with Mr. Davis—not that I wanted to be a Democrat—a common ground on some basis that would uplift what my self-estimate might justify in the way of putting us on the same intellectual plane. Here it was! If Mr. Blaustein had done me the honor of inviting me to make a choice, I think I should probably have made the same choice as Mr. Davis. The fact that he recently spent fifty minutes in the Court of Appeals for the Second Circuit (they would not allow him any more time) trying vainly to upset my findings as a special master does not diminish my pleasure at thinking in the same channels with him now.

He puts his predilection for Post partly on the ground of old acquaintance in West Virginia. There is no need to do that. Mr. Post's three volumes of Randolph Mason stories of law are sufficient reason for such a choice—and the one selected by Mr. Davis is undoubtedly the outstanding one of the lot. Mr. Post's many volumes of outstanding short stories of mystery are a staunch foundation for enduring fame—master as he was (now twenty-four years gone!) of clever plot, clear characterization and literary style. Have you read "Uncle Abner"? If not, your education is incomplete. Unfortunately, Mr. Post has been woefully neglected, and few devotees of mystery stories today seem to have heard of him. Howard Haycraft, in "Murder for Pleasure" (1941), has this to say of him: "No reader can call himself connoisseur who does not know *Uncle Abner* forward and backward. . . . Posterity may well name him, after *Dupin*, the greatest American contribution to the" detective story form.

My one criticism of the editorial work also has to do with this story. Mr. Post's stories on Randolph Mason are all supported by actual legal authorities, so that the reader is not left in position to say "Oh, that cannot possibly be the law!" This seems especially necessary for this particular tale, involving as it does a getting-away with murder. Therefore, I regret (especially in a book that will

probably have special appeal to lawyers) that Mr. Blaustein saw fit to eliminate the case references.

Unfortunately, the other choices are not always so felicitous, although some of them are decidedly in character. For example, on the credit side, Adlai Stevenson's choice of one of A. P. Herbert's inimitable stories of *Uncommon Law*, involving a negotiable cow, could not have been bettered; or Eric Johnston's choice of William Faulkner's "Tomorrow". On the debit side, the natural expectation of what Dean Pound would select is met with the longest, most boring story in the collection, "Boys Will Be Boys" by Irvin S. Cobb, of which the only connection with law and lawyers seems to be the fact that one of the characters is a judge. And the Lord High Chancellor picked a one-page affair that is merely an anecdote. Why did he not follow Mr. Stevenson's example?

This leads us to wonder what connection some of the selectors made with the manifest objective of Mr. Blaustein. Does John Galsworthy's psychological study, "The Juryman" (selected by the late Chief Justice Vinson) come within it, interesting as it is? Or the brief reminiscences of "Coroner de Luxe" (by Ruel McDaniel, chosen by Mr. Justice Clark)? And what has Stephen Vincent Benet's classic and absorbing "The Devil and Daniel Webster" (picked by Elmer Rice) to do with the editor's plan?

On the witty side, in addition to Mr. Stevenson's contribution from *Uncommon Law*, is John J. McCloy's favorite, "The Barrister" by A. A. Milne. The piece is made up almost entirely of a piece of cross examination that clearly did not come out of Mr. Wellman's famous examples, yet it is a matter of sheer delight and not without instructive content. And Mr. Cohen's tale of "The Law and the Profits" (for which our much respected Samuel Williston is responsible) is an excellent tale of low-brow legal intrigue.

Erle Stanley Gardner's is the only name appearing twice. Asked to take part in the plan, he selected Harry Klingsberg's "Doowinkle, Attorney" —a trial scene with a real Perry Mason dénouement. And Jerry Giesler, whose name is associated with the legal affairs of many movie stars and with the defense of Clarence Darrow against a charge of jury-fixing, offered Mr. Gardner's "The Case of the Irate Witness"—a typical Mason case in short form.

We may well come from the character of the choices made to the character of those invited to choose. Why was not President Eisenhower given a chance? The legislative and judicial branches were well represented. He has more to do with the law than most lawyers, and his name is certainly better known to most potential readers of the book than that of many of them. Who, for example, is Ruel McDaniel? (Or am I the ignorant one?) And, of course, the inevitable question will arise, why is the co-progenitor of "South Pacific" asked to choose? Yet what a lawyer-like and excellent choice Oscar Hammerstein II made—Marc Connelly's "Coroner's Inquest"—even though no man on the street would think of Mr. Hammerstein as a lawyer! It seems that he went to Columbia University Law School, in the course of which he became so much interested in the stage that he never bothered even to take a bar examination. Which brings up the question—what is a lawyer? Is it one who has studied law, either at a reputable law school or at the one where I acquired what law I know? Is it one who has out-foxed the bar examiners? Is it one who has practiced law? Or, as Will Cuppy would say, to hell with it? The answer is (as I have it from "a usually reliable source") that the publishers discovered Mr. Hammerstein's Columbia connection and insisted (is that too strong a word?) upon his having an invitation. In any event, he certainly did his job better than Roscoe Pound or Lloyd Paul Stryker (with his choice of the usually inimitable Cornelia Otis Skinner's routine and plodding account of a layman's experience with a real estate closing).

Nobody chose any of the Little Amby stories by Thomas McMorrow. And there are numerous other stories of the courts that are missing from these pages. (Not Mr. Blaustein's fault—he merely edited the choices made by his jury.) But the book is entitled "Fiction Goes to *Court*". The court is hardly more than a side-line in numbers five, seven, fifteen, seventeen, and perhaps others. (You will have to beg, borrow, steal, or buy the book to see which ones I am designating—but I hope you will read it by one means or another.)

None of this—not even the most derogatory part—is intended to belittle the book as a whole. "Au contraire," as Dorothy Sayers wrote of the Frenchman on the English Channel steamer who was asked if he had dined. It is a pleasure throughout (if I may retain some reservations about the Judge Priest story—and how can a man entrusted with the responsibilities of a judge be so imperceptive as to use the inexcusable English that he uses?), and I hope everyone who reads it will have as much pleasure out of it as I did.

But I still give the palm to John W. Davis for his selective power. It must have come from his ability to select the Big Issue when he, with Fiction, goes to court.

CHARLES M. LYMAN
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SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS. *By Frank D. Emerson and Franklin C. Latcham. Cleveland: The Press of Western Reserve University. 1954. $4.00. Pages 242.*

AMERICAN BUSINESS CORPORATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS. *By Edwin Merrick Dodd. Edited by Zechariah Chafee, Jr. Cambridge: Harvard University Press. 1954. $7.50. Pages 524.*

Both books are of value to the practicing lawyer as well as to philosophers and historians in the corporate field.

Shareholder Democracy treats of such practical matters as the law and practice of proxy statements and solicitations, proxy contestants' expenses, and the Proposal Rule, currently designated X-14 A-8, which enables stockholders to cause management to mail stockholder proposals to the stockholders. Mr. Emerson served for a time as attorney for the Securities and Exchange Commission.

In addition to these and other practical matters, it discusses the need for increasing shareholder democracy as a benefit to the corporation as well as shareholders. Obviously the two-party system would not work in corporation affairs. However, stockholders should be able to do more than follow the time-honored Wall Street rule: "If you don't like the management, sell your stock." Here is an attempt to add the words ". . . provided you can get a fair price. If you can't, do something about the situation."

In order to make this possible, ways and means must be devised to enable shareholders to participate in the areas of major importance such as adequacy of earnings and dividends. To do this they must be able to turn to capable and impartial agencies for guidance in controversial matters. Such agencies as investment counsel, advisory services, stock exchange houses, security-analyst groups, investment funds and the like must utilize their unusual opportunity for informed leadership on stockholder questions.

American Business Corporations, it seems clear from Dean Griswold's foreword, has been published three years after the tragic death of the author because of the great respect and admiration held for him by his fellow Harvard Law School faculty members and because Professor Zechariah Chafee, Jr., with the assistance of other members of the faculty and staff, was willing to pick up the task and carry it through to completion.

The author, generally called Merrick Dodd, was well known in corporation circles throughout the country. He gave generously of his time as a member of the top-flight Corporation Committee of the American Bar Association's Section of Corporation, Banking and Business Law which drafted the Model Corporation Act.

After a brilliant record at Harvard he practiced in Boston for a few years, was a member of the War Industry Board during World War I, and then practiced law again in Boston until 1928 at which time he joined the Harvard Law School faculty and continued until his accidental death in 1951, rendering part-time service with the War Production Board during World War II. He taught corporation law principally and was a recognized authority in this field.

At the close of World War II he began work on *American Business Corporations*. Shortly before his death he related to Dean Griswold that the basic work was largely done and he hoped to have the book completed by the end of the then current academic year, 1951.

The specialist as well as the historian in the corporate field should understand the development of corporation law in this country perhaps more than that of other fields of law because, while we are greatly indebted to English law in many fields, corporation law has been principally developed here. For this purpose the author has traced the development of corporation law from its early beginnings in this country to the year 1860.

There is a natural division between case and statutory law in that the decisions in the various states may be cited in any state where applicable while a corporation statute only applies to its own state. Because of this distinction the book is divided principally into two parts.

The first part traces the development of American judicial lawmaking from the earliest reported decisions through 1860. It divides this period into two parts, the first ending with 1830. The first period is noteworthy for the constitutional law cases of *Dartmouth College* v. *Woodward*, *McCulloch* v. *Maryland*, and *Bank of the United States* v. *Deveaux*, and decisions to establish the right of a foreign corporation to sue in the courts, to establish workable rules of law governing corporate contracts and torts, and to lay the foundations of the law of corporate voting, share subscriptions, preemptive rights and transfers of shares.

The second period covers the thirty years ending with 1860 in which the decisional laws of business corporations were expanded and refined. In constitutional law notable decisions were made both with respect to the contractual nature of corporate contracts and corporate citizenship. It extended the protection of the *Dartmouth College* case to individual shareholders as well as to the corporation itself, and, on the other hand, it limited that protection through strict construction of corporate charters and eminent domain. It opened the doors of the federal courts more widely to the corporation by giving it substantially the status of a citizen.

The second part of the book is devoted to legislative lawmaking, principally by the Massachusetts legislature. It traces the evolution of industry from farming, deep-sea fishing and maritime to a factory system featuring cotton textile, it shows the rise of incorporated banking and insurance, the development of the transportation system from canals and toll roads to railroads, and special legislative acts for each corporation superseded by a general incorporation act.

There is also an account of the adoption, continuation and ultimate abandonment by each of the New England states of a type of business association.

Much more could be said for each of these books to show their value to the practicing lawyer as well as the philosophers and historians in the corporate field.

BENJAMIN WHAM

Chicago, Illinois

A COUNTY JUDGE IN ARCADY: SELECTED PRIVATE PAPERS OF CHARLES FERNALD, PIONEER CALIFORNIA JURIST

By Cameron Rogers. Glendale, California: The Arthur H. Clark Co. 1954. $7.00. Pages 258.

"Arcady", for present purposes, is Santa Barbara, California. Of that place Homer D. Crotty writes in the *Harvard Law School Bulletin* for December, 1954: "Santa Barbara is said to have the most delightful practice of any of the cities in the south." This reviewer, not being a Texan, accepts these assumptions *arguendo;* indeed they are corroborated by his own recollections of the *locus in quo* as viewed from the "Morning Daylight" during the course of his pilgrimage to the 1952 American Bar Association Annual Meeting. He can visualize also the pleasant experiences the author (a grandson of Judge Fernald) must have enjoyed at that ideal haven for research, the Huntington Library at San Marino, which is the repository of the Fernald papers utilized in the present volume.

Lawyers must always be grateful for the publication of court records and biographies of judges. Such material illustrates "law in action". Particularly is that true when it describes a picturesque pioneer community such as California during the days of the Gold Rush and the Civil War period. A native of Maine, Charles Fernald arrived at Santa Barbara on June 30, 1852, to visit a fellow New Englander, Edward Hoar, for a few hours, and was forthwith chosen to fill a vacancy in the hazardous office of sheriff.

Through friendship with the native Spanish *Californios* he quickly rose to be District Attorney, County Judge, and (later in life) Mayor of Santa Barbara and United States Commissioner. After eight years of service on the bench (at $1,500 per year) he turned to private practice in 1861, at the age of thirty-one, in contemplation of matrimony. When afterwards he was urged to be a candidate for office he said: "I cannot see . . . any great difference in principle between the act of soliciting an office of trust and profit and the act of asking pecuniary aid from the public" (page 38).

Interesting glimpses of the era emerge from these letters, elucidated by the comments of Mr. Rogers. Prisoners could easily escape from the adobe jails and also steal the court papers relating to their own cases or others in which they were interested (page 100-1). Of Edmund Randolph, grandson of Washington's Attorney General, Judge Fernald writes that he "displays an opulence of learning, but, after all, [is] not a good lawyer. He seems to copy after a class of Irish lawyers now extinct whose custom it was to make a great speech and convict their clients whether guilty or innocent. . . . They spoke to the multitude of listeners rather than to the jury" (page 139). But Judah P. Benjamin he regarded as "the first and best lawyer in America" (page 181). Judge Fernald carried on an interesting correspondence with his future wife, who was interested in politics. The Republican Party, he wrote, "represents a progressive idea, humane, charitable, just" (page 143). "Men are seldom reformed by abuse or reproaches. The Republicans cannot abolish slavery by that course" (page 151). On March 20, 1861, he expressed fear "that the Union on its present basis—to wit: a Constitution, could no longer exist". Secession was treason, but is "revolution, if successful". Abolitionists, believing slavery to be sinful, "may destroy . . . all hope of constitutional liberty". Meanwhile England "will act as her interest dictates as she has always acted. . . . She cares little about the sins of the other nations providing that she profits by them" (pages 184-193). George Washington, he believed, was not a great soldier, but this fact enabled him to win the Revolutionary War: "If the British army had . . . met with more sharp resistance . . . it might have stimulated the British Government to much greater exertion." As it was, the British grew "weary of defeating us" (page 204).

Judge Fernald also describes the beauty of the outdoor life of the region: how he "camped for the night in a forest of ancient oaks", or how he followed a companion who sought to save ten miles by pursuing a trail which became impenetrable and they were forced to retrace their steps, or how he crossed a flooded river on horseback. "It was splendid", but he would not wish to repeat the exploit. "The sea is too near, and a steep bluff coast, to be agreeable. I looked back at the torrent in triumph" (pages 154, 157, 179).

This book furnishes a colorful account of an active judge's life in the midst of turbulent scenes.

EDWARD DUMBAULD
Uniontown, Pennsylvania

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

Antitrust Law . . .

Use of Interstate Business To Destroy Local Business

▪*Moore* v. *Mead's Fine Bread Company*, 348 U. S. 115, 99 L. ed. (Advance p. 123), 75 S. Ct. 148, 23 U. S. Law Week 4026 (No. 121, decided December 6, 1954.). *Judgment of the Court of Appeals for the Tenth Circuit reversed.*

This was a suit for treble damages for violation of the Clayton Act as amended by the Robinson-Patman Act.

Petitioner operated a local bakery at Santa Rosa, New Mexico. Respondent was a corporation operating a bakery at Clovis, New Mexico, affiliated with a chain of bakeries operating in New Mexico and Texas. When petitioner threatened to move his bakery from Santa Rosa, where he and respondent were competitors. a number of merchants agreed to purchase his products exclusively. Respondent labeled this a boycott and cut the wholesale price of bread in Santa Rosa from 14 to 7 cents a pound. No prices were cut in any of the other cities in which either party did business. The price war continued from September, 1948, to April, 1949, and resulted in petitioner's being forced out of business.

Mr. Justice DOUGLAS, speaking for the Supreme Court, held that this type of price cutting was foreign to any legitimate commercial competition. In upholding the district court's award of damages to petitioner, the Court said that the Clayton Act and the Robinson-Patman Act barred the use of interstate business to destroy local business. "If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency, but because of their strength and ability to wage price wars" the Court declared.

The case was argued by Lynell G. Skarda and Dee C. Blythe for petitioner, and by Edward W. Napier for respondent.

Commerce . . .

Denial of Use of State Highways To Interstate Truckers

▪*Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61, 99 L. ed. (Advance p. 101), 75 S. Ct. 191, 23 U. S. Law Week 4044. (No. 44, decided December 6, 1954.) *Judgment of the Supreme Court of Illinois affirmed.*

A state may not deny an interstate common carrier the use of its highways as punishment for repeated violations of state highway regulations. This holding by the Illinois Supreme Court was here upheld by the nation's highest tribunal.

The Hayes Freight Lines, Inc., is a carrier doing an extensive transport business in Illinois and seven other states. It operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. Hayes repeatedly violated an Illinois statute limiting the weight of freight that can be carried in commercial trucks over that state's highways. Violations are punishable by total suspension of the right to use the highways for periods of ninety days or one year. This action was brought in a state court to restrain Illinois officials from prosecuting Hayes as a repeated violator. The state supreme court held that suspension of the interstate carriage would conflict with the Federal Motor Carrier Act.

Mr. Justice BLACK affirmed, speaking for the Supreme Court of the United States. The Motor Carrier Act is a comprehensive plan for regulation of the carriage of goods by motor truck, the Court said, a plan so comprehensive that it greatly curtails the power of the states in their regulation of the highways. The Court concluded that suspension of the carrier's right to use the Illinois highways would be the equivalent of a partial suspension of its federally granted certificate, a clear violation of the federal policy.

The Court observed that "conventional forms of punishment" could still be used by the states to enforce their highway laws, and, moreover, the federal statute itself requires motor carriers to abide by valid state laws. The Court suggested that Illinois might obtain relief from the Interstate Commerce Commission to protect its highways.

The case was argued by John L. Davidson, Jr., for petitioners and by David Axelrod for respondent.

Evidence . . .

Amount of Corroboration Necessary To Convict on the Strength of Accused's Extrajudicial Statements

▪*Opper* v. *United States*, 348 U. S. 84, 99 L. ed. (Advance p. 104), 75 S. Ct. 158, 23 U. S. Law Week 4040. (No 49, decided December 6, 1954). *Judgment of the Court of Appeals for the Tenth Circuit affirmed.*

Reviews in this issue by Rowland Young.

This case raised the question how much more evidence was needed to convict in addition to statements to police by the accused which admitted some of the facts but denied guilt.

The petitioner was charged with violation of a federal statute that punishes employees of the United States who receive outside compensation for any services to be rendered in any matter before a federal department or agency in which the Government is a party. Opper allegedly induced one Hollifield, an employee of the Air Force at Wright Field, to recommend approval of a certain brand of sun goggles for purchase by the Air Force. Part of the Government's case rested upon certain admissions of facts contained in a written statement submitted by Opper to the FBI and in various oral statements in interviews with FBI agents. In these statements, Opper insisted that he had never requested anything of Hollifield, and that $1,000 which he gave him was given strictly as a loan, that no security was given for the loan and that the money had not been repaid. He consistently denied any guilt of the offense charged.

Hollifield and Opper were tried together and convicted. The conviction was affirmed by the Court of Appeals. Before the Supreme Court Opper argued that his statements were so analogous to confessions that the same rules must apply, and that if the statements were treated as confessions, the conviction could not stand.

Mr. Justice REED, speaking for the Court, said that the statements in question were not confessions, but that corroboration was necessary since they were admissions of fact essential to prove the charges against the petitioner. This ruling was in spite of the Government's argument that exculpatory statements do not have behind them the pressure of coercion or the inducement of escaping the consequences of a crime.

In considering the extent of the corroboration necessary for a judgment of conviction, the Court adopted the rule that the corroborative evidence need not be sufficient independent of the statements, to furnish the *corpus delicti*. While Opper's statements did not establish a *corpus delicti*, they did tend to establish one element of the offense with which he was charged—payment of money. His conviction was allowed to stand because the Court found that the independent evidence was sufficient to justify the jury in finding the other element—the rendering of services by the government employee.

The case was argued by Frederick Bernays Wiener for petitioner and by John F. Davis for respondent.

Labor Law . . .

Duty of Employer When New Bargaining Agent Loses a Majority of Employees from Its Membership

■*Brooks* v. *National Labor Relations Board*, 348 U. S. 96, 99 L. ed. (Advance p. 111), 75 S. Ct. 176, 23 U. S. Law Week 4038. (No. 21, decided December 6, 1954.) *Judgment of the Court of Appeals for the Ninth Circuit affirmed.*

What is the duty of an employer toward a duly certified bargaining agent if, shortly after an election that chose the bargaining agent, the union has lost a majority of the employees from its membership?

Petitioner, the operator of an automobile agency, refused to bargain with the union when, a week after the election he was presented with a handwritten letter signed by nine of the thirteen employees renouncing the victorious union. The National Labor Relations Board found him guilty of an unfair labor practice and the Court of Appeals enforced the Board's order to bargain.

The Supreme Court affirmed in an opinion written by Mr. Justice FRANKFURTER. In spite of petitioner's argument that he was only seeking to vindicate the rights of the employees to select their bargaining representative, the Court said that, if the employer has any doubts about his duty to bargain, he can petition the Board for relief, but meanwhile must continue to bargain in good faith. "The underlying purpose of this statute [the National Labor Relations Act] is industrial peace" the Court declared, and to secure that peace Congress has devised a formal method of choosing collective bargaining representatives and has fixed the spacing of elections. The opinion reviews the "working rules" set up by the NLRB for the conduct of elections, some of which were incorporated into the statute by the Taft-Hartley Act. While the NLRB may, if the facts warrant, revoke a certification or agree not to pursue a charge of unfair labor practice, the Court said, employers faced with the problem in this case cannot resort to self-help.

The case was argued by Erwin Lerten for petitioner and by David P. Findling for respondent.

Veterans . . .

Right of Veteran To Sue Under the Tort Claims Act for Negligence of Veterans Hospital

■*United States* v. *Brown*, 348 U. S. 110, 99 L. ed (Advance p. 120), 75 S. Ct. 141, 23 U. S. Law Week 4034. (No. 38, decided December 6, 1954.) *Judgment of the Court of Appeals for the Second Circuit affirmed.*

This case raised again the troublesome question of the right of servicemen to sue for damages for injuries under the Federal Tort Claims Act. In *Brooks* v. *United States*, 337 U.S. 49 (1948), the Court allowed recovery under the Act where two soldiers on leave were negligently injured on a public highway by an army truck. In *Feres* v. *United States*, 340 U.S. 135 (1950), recovery under the Act was denied to a serviceman injured while on active duty.

The present suit was filed under the Tort Claims Act to recover damages for allegedly negligent treatment of an injured knee in a Veterans Administration hospital. The veteran had been honorably discharged in 1944 because of the knee injury. The alleged negligence occurred during an operation in 1951.

The district court dismissed the complaint on the theory that the Veterans Act, 48 Stat. 526, 38 U. S. C. § 501a, provided the exclusive remedy. The Court of Appeals for the Second Circuit reversed.

Mr. Justice DOUGLAS, speaking for the Court, held that this case was controlled by the *Brooks* doctrine and not by that of the *Feres* decision, and accordingly recovery under the Act was allowed. Distinguishing the two lines of cases, the Court said that the "peculiar and special relationship of the soldier to his superiors" accounted for the *Feres* ruling. Here, the respondent was not on active duty nor subject to military discipline when the alleged negligence took place, and the *Feres* ruling was therefore inapplicable. The Court announced that it was adhering to both the *Feres* and *Brooks* doctrines.

A dissent by Mr. Justice BLACK, in which Mr. Justice REED and Mr. Justice MINTON joined, pointed out that a soldier injured in an army hospital cannot recover damages under the Act; to allow a discharged veteran to recover when a soldier cannot, the dissent declared, is an "unjustifiable discrimination which the Act does not require".

The case was argued by Samuel D. Slade for petitioner and by Lee S. Kreindler for respondent.

The President's Page

(*Continued from page 100*)

States, suggests that appropriate study and consideration be given by the Congress to the advisability of providing an official residence for the occupant of that high office.

Although its statutory duties do not include the recommendations of adequate survivor pensions for widows and dependents of the officials whose salaries are the subject of this report, the Commission strongly suggests that the Congress should consider the very exhaustive Task Force report of this Commission on that subject in order that in addition to the recommendations herein contained, appropriate legislation providing adequate contributory pensions for that purpose might be enacted. It is noted that unlike other Federal officers and employees, no provision whatever exists for pensions for widows and dependents of Justices of the Supreme Court of the United States and Federal Judges, and inadequate provision is presently made for pensions for widows and dependents of Members of Congress. In the opinion of the Commission, this situation should be remedied promptly.

As a member of the Commission and as one who for years has followed the travel of the endeavors of the American Bar Association to bring about appropriate legislation for the judicial branch of the Federal Government to be properly compensated, I am concerned that several bills have been introduced setting forth compensation considerably less than that recommended by the Commission. Rumor has it that others will be introduced. The only opposition that I personally have any knowledge of either directly or by hearsay to the compensation proposed by the Commission comes from certain rural territories of the United States. Those of you who live in rural areas must remember that it is only on an average of twenty years that these salaries of the Congress and the judiciary are adjusted. And also with the tremendous acceleration of the industrial revolution involving the whole land, what is rural today is metropolitan tomorrow—what is agricultural today is industrial tomorrow. The raises proposed are not as much as they appear to be at first blush. By way of example, the recommended gross increase of $12,500 for a member of Congress represents a net increase over the present salary in terms of the remainder after taxes of $8,494. However, in net purchasing power in terms of the 1939 dollar the Congressman receives an increase of only $1,472.

It seems to me there is nothing that should appeal more to the lawyer than the absolute necessity of thoroughly paying our Congress and the federal judiciary. I ask each of you who believes as I believe that the salaries recommended by the Commission are fair, just and equitable to write your respective Congressman and Senators requesting that any Bill passed should be commensurate with the Commission's recommendations; and if there has to be a discrepancy that obviously the discrepancy at the higher bracket will cause less injustice than in the lower.

On Tuesday, February 22, 1955, immediately after the adjournment of the House of Delegates, the dedication ceremonies of the Cromwell Memorial Library at the American Bar Center will be held. We must ever be mindful as well as grateful that it was this great lawyer who first remembered us with a sizable bequest, which bequest initiated and made possible the American Bar Center, and we ought, as many as possible, to honor him by attending these services. Buses will be provided to transport all who wish to go from the Edgewater Beach Hotel to the American Bar Center and return.

There will also be buses Sunday afternoon, February 20, from 3:00 to 5:30, to transport those who wish to go out to the headquarters to inspect the same and staff members will be present to properly show you around.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
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Administrative Law . . . *subpoenas*

■ Construing a new provision in the Immigration and Nationality Act of 1952, the Court of Appeals for the Third Circuit has ruled that a provision granting immigration officers power to subpoena "witnesses" does not mean that parties may be subpoenaed under the guise of witnesses.

The case arose because of the refusal of a naturalized citizen to appear in response to a subpoena at an administrative hearing which was the opening chapter in a course of action by which the Government was seeking to obtain denaturalization through eventual court action. The power to subpoena was based on a section [8 U.S.C.A. §1225 (a)] of the statute providing that "any immigration officer . . . shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers . . ."

Warning that the word "witness" is likely to be ambiguous, the Court held that a citizen confronted with an administrative proceeding posing a challenge to his right to retain citizenship could not be regarded as a "witness" under the statute so as to be compelled to appear and testify against himself. The Court was impelled to its conclusion partly because the Act in several other sections, when providing for subpoena power, specifically includes parties, whereas §1225 (a) does not. The Court felt, moreover, that since the Act makes denaturalization an adversary proceeding, surrounded by safeguards, it would be inconsistent to allow an immigration officer, armed with subpoena power over the party involved, to foreclose by administrative action those safeguards.

(*U.S.* v. *Minker*, C.A. 3d, December 1, 1954, Hastie, J.)

Attorneys . . . *disbarment*

■ A teaching that an attorney cannot be disbarred summarily from practice in a particular court, except for a contempt committed in open court, is contained in a recent decision of the Court of Appeals for the Ninth Circuit.

The disbarred attorney had obtained a restraining order for a client in the United States District Court for the Southern District of California. Four days later the matter was again before the district court with a different judge presiding. The judge found that the attorney had committed a fraud on the court by procuring the restraining order and set it aside. He then read an already prepared order of disbarment and handed it to the clerk for entry. This was not done in a separate proceeding, and the attorney claimed he had no knowledge that the judge intended to do anything other than set aside the restraining order.

Under these circumstances, the Court held, the district court had denied the attorney due process of law under the Fifth Amendment and that the district court lacked jurisdiction to enter the disbarment order. "A federal court", the Court said, "is without jurisdiction to disbar an attorney for a contempt not committed in or near a hearing then being conducted, where due process is denied him by failing to give him notice that his disbarment is being considered or by failing to give him an opportunity to prepare and present a defense."

The decision of the Court left standing the power to disbar for a contempt in open court, and Judge Chambers, in a concurring opinion, offered a colorful example to which it might apply: "Venturing into the unknown, I suggest that if Morris Lavine [the attorney] had come into court with six guns at his side and fingers on triggers demanding that a district judge sign an order, the district judge would have power then and there without formality to disbar Mr. Lavine."

(*Matter of Los Angeles County Pioneer Society*, C.A. 9th, November 26, 1954, Denman, J.)

Attorneys . . . *unauthorized practice*

■ The Supreme Court of Arkansas has held that a bank cannot use its own house attorneys to conduct court proceedings in matters in which the bank is acting in a fiduciary capacity as personal representative, guardian or conservator. Such activity, the Court ruled, constitutes unauthorized practice of the law by a corporation.

Involved in the action for an injunction instituted by the Arkansas Bar Association was a Little Rock bank which employed full-time two licensed attorneys. These attorneys prepared all petitions, orders and other instruments required in estates the bank was administering and made appearances and presented these instruments in probate and chancery courts.

The bank conceded that as a corporation it was not legally able to practice law under Arkansas statutes. But, it contended, any individual or corporation may appear in court and "practice law" for himself and in connection with his own business, and that's all the bank was doing.

The Court rejected this argument,

Editor's Note: **Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

holding that a trustee or a personal representative does not act for himself. The Court declared:

> . . . an individual or corporation such as the [bank] here is not looking after its own business when, acting as an administrator, an executor, guardian or in a similar fiduciary capacity, it undertakes to use the processes of the courts of this state in administering and settling the affairs of its *cestui que trust*. Stated specifically we hold that a person who is not a licensed attorney and who is acting as an administrator, executor or guardian cannot practice law in matters relating to his trusteeship on the theory that he is practicing for himself. . . . the [bank], although acting through an employee, who is a licensed attorney, cannot practice law in the probate and chancery courts on the theory that it is handling its own business. The very term itself it seems to us implies that a trustee or personal representative is not acting for himself and in connection with his own business affairs but on the contrary is acting for others who ordinarily would be the beneficiaries.

The Court also directed the lower court to enjoin the bank from advertising its availability as a fiduciary. In this connection it had been shown that the bank advertised its services, but that the advertisements recommended the reader consult his own attorney and did not hold the bank out as an attorney. The bank's house attorneys had admitted that it had been difficult to avoid giving legal advice to persons who responded to the advertising.

(*Arkansas Bar Association* v. *Union National Bank*, Sup. Ct. Ark., October 11, 1954, Ward, J.)

Constitutional Law . . . *segregation*

■ Another federal district court has read the *School Segregation Cases*, 347 U.S. 483, as having no effect outside public education, and specifically not affecting the rights of states to segregate as to recreational facilities, as long as equal facilities are furnished.

Thus ruling is the United States District Court for the Northern District of Georgia, which says that the "separate but equal" doctrine is not in conflict with the Fourteenth Amendment, and that the Supreme Court rejected the doctrine "only as it applied to public education".

Not quite so confident, but reaching the same result, is the United States District Court for the District of Maryland, which refused to extend the public-school holding to public beach and swimming facilities in *Lonesome* v. *Maxwell*, 123 F. Supp. 193 (40 A.B.A.J. 872; October, 1954).

Public golf courses were involved in the instant case. Atlanta maintains seven, but precludes Negroes from using any of them by city ordinance. Thus, under the "separate but equal" doctrine, and without resort to the public-school doctrine, the Court ordered the city to discontinue barring Negroes from the courses. The Court, however, postponed the effect of its order to allow the city a "reasonable opportunity" to put into effect regulations setting aside some courses for Negroes on a segregated basis.

(*Holmes et al.* v. *City of Atlanta et al.*, U.S. D.C. N.D. Ga., July 8, 1954, Sloan, J., 124 F. Supp. 290.)

Courts . . . *prohibition*

■ Two sentences in an opinion of the Ohio Supreme Court have generated some apparently unique legal proceedings that will determine whether any remedy exists by which a trial judge can obtain expungement from a supreme court opinion of remarks which he deems reflect adversely on his judicial capacity and integrity. The aggrieved trial judge declares that the cases will decide whether the Ohio Supreme Court is "above law, the people and the Constitution".

The now-complicated proceedings began with the trial of Frank Hashmall before a jury in the Court of Common Pleas of Summit County, Akron, Ohio, with Judge Walter B. Wanamaker presiding. Tried on a two-count indictment, Hashmall was found guilty by a jury of using a false and fictitious name in an application for a certificate of title to a motor vehicle and of giving a false or fictitious address in an application for a certificate of title. Judge Wanamaker sentenced Hashmall on each count to indeterminate imprisonment terms of six months to five years and ordered the sentences served consecutively.

On appeal, the Ohio Supreme Court, in a *per curiam* opinion, affirmed the convictions [160 Ohio St. 565, 117 N.E. 2d 606], but ruled that Judge Wanamaker had abused his discretion in making the sentences consecutive. The Court modified the judgment to concurrent sentences.

Then the Court punched the hornet's nest by dropping these two sentences, referring to the consecutive sentencing, into its opinion:

> . . . The record discloses that the trial court probably did this because he was advised that defendant was a Communist. However, a Communist is entitled to even-handed justice in our courts.

The West Publishing Company thought these remarks significant enough to make a headnote in the Northeastern Reporter: "A Communist is entitled to even-handed justice", and keyed it to Constitutional Law 252.

Judge Wanamaker thought the remarks uncalled-for, untrue, offensive and damaging to his judicial reputation and standing. He wrote a letter to all members of the Supreme Court asking that the two sentences be expunged from the opinion. Hearing nothing, he wrote again three weeks later, renewing his request and asking: "When a person does not acknowledge correspondence, it can fairly be presumed he is on vacation. Can the same be presumed of a conscience?"

The correspondence was ineffectual, and Judge Wanamaker then filed a formal application to expunge the challenged sentences. The application was supported by affidavits that during his twenty-three years on the bench Judge Wanamaker had sentenced all persons convicted on multiple counts by juries to consecutive sentences, except in two instances. The application asked that the language be expunged "as

a matter of justice and right".

Judge Wanamaker also attempted to file in the Supreme Court an "affidavit of disqualification" by which he sought to declare the Supreme Court justices disqualified to pass on the application for expungement under a section of the Ohio Constitution providing that if any judges of the Supreme Court "shall be unable, by reason of . . . disqualification . . . to consider and decide a cause" then the Court may summon judges from any court of appeals to replace them. The affidavit sought to disqualify the entire Supreme Court, except one, who would have the right to choose the replacement judges.

The clerk of the Supreme Court, however, refused to file Judge Wanamaker's affidavit of disqualification. The judge then sought a writ of mandamus against the clerk but this was denied by a court of appeals on the ground that it had no jurisdiction of an action against the clerk of the Supreme Court, since the clerk was an arm of the Court. This case is now on appeal to the Supreme Court.

Two days after the mandamus action was commenced, the Supreme Court struck from its files the application to expunge. Judge Wanamaker then commenced an action for a writ of prohibition against the members of the Supreme Court. The justices demurred and the court of appeals denied the writ on the ground that it had no jurisdiction to issue the writ against the Supreme Court. This case is likewise on appeal to the Supreme Court.

Thus the unique question is presented: May an inferior court issue a writ of prohibition against a superior court? And if it may not, is an ultimate superior court indeed "above the law"?

Admitting the novelty of his position, Judge Wanamaker argues that to deny the right of an inferior court to issue the writ would be to create a "tyranny of superior officialdom [of] men . . . no longer capable of error or wrong doing".

To the justices, the issue is simple: An inferior court has no power to issue a writ of prohibition against members of a superior court.

(*State ex rel. Wanamaker* v. *Miller* and *Ohio ex rel. Wanamaker* v. *Weygandt et al.*, Sup. Ct. Ohio. NOTE: These cases are pending. Sources of the above material are the *Akron Legal News*, April 15, 1954, and the briefs of the parties.)

Elections . . .
designation of race of candidate on ballot

■ An Oklahoma law requiring the placing of the word "Negro" in parentheses after a colored candidate's name on the ballot does not deprive the candidate of the equal protection of the laws or of any rights, privileges and immunities under the Federal Constitution, according to the United States District Court for the Western District of Oklahoma.

The Oklahoma Constitution states that the word "Negro" means a person of "African descent" and that "the term 'white race' shall include all other persons". An Oklahoma statute requires a candidate to declare himself as either "white or Negro", and provides that "any candidate who is other than of the white race, shall have his race designated upon the ballots in parenthesis after his name".

In dismissing an action for damages brought by a Negro candidate for senator in the state's Democratic primary, against the state election board, the Court held: "The placing of the word 'Negro' on a ballot after the name of a candidate is merely descriptive and properly serves to inform the electors of the fact that the candidate is of African descent. It likewise serves to inform the voters that the other candidates are members of the 'white race.' It is, therefore, my opinion that the plaintiff has not been deprived of the equal protection of the laws or any rights, privileges or immunities secured by the Constitution of the United States."

(*McDonald* v. *Key et al.*, U.S. D.C. W.D. Okla., October 18, 1954, Chandler, J., 125 F. Supp. 775).

Evidence . . .
parol evidence

■ The Supreme Court of Oklahoma has ruled that parol evidence may be employed to supply a duration to a written memorandum of employment, where the writing itself is silent as to the duration of employment.

The employer had signed a letter to the employee stating that the employee was to receive a certain weekly salary and sales commission. The writing, however, contained nothing about the length of the period of employment. Shortly thereafter, the employer notified the employee that he would not be hired. At the trial, the employee was permitted to testify that in the negotiations leading to the letter it was orally agreed the employment period would be for one year.

The Court held that the written memorandum was incomplete and that parol evidence properly could be allowed to supply the omission, although it could not be inconsistent with or repugnant to the written agreement. This rule is applicable to employment contracts, the Court declared.

One judge dissented on the ground that the written memorandum was complete since most employment contracts are for indefinite duration. Therefore, in his view, parol evidence was not proper and would vary the terms of the writing, which, by its silence on duration, was an indefinite contract terminable at the will of the employer.

(*Ross* v. *Stricker et al.*, Sup. Ct. Okla., October 6, 1953, as amended October 15, 1954, Blackbird, J., 275 P. 2d 991.)

Husband and Wife . . .
good-bye, common law

■ The common-law fiction of the unity of husband and wife does not exist in Illiniois so as to prevent the conviction of spouses for conspiracy, according to the Supreme Court of that state.

The husband and wife were jointly indicted and convicted for viola-

tion of the Uniform Narcotic Drug Act. They contended this was improper because at common law a husband and wife were considered as one person, and that therefore they could not be guilty of conspiracy, a crime requiring the participation of more than one person.

In a holding of first impression in the state, the Court said that "no relevant reason which might have supported the asserted common-law rule exists today [and] that a husband and wife who enter into a criminal conspiracy are not immunized from prosecution by surviving radiations from the common-law fiction of unity of husband and wife". Supporting its conclusion, the Court adverted to the common-law basis for the rule and noted the retreat of modern case law and statutes from common-law husband-and-wife concepts, pointing to the right of married women to own separate property, the removal of the presumption of coercion of wife by husband and the right of either spouse to testify against the other.

(*Illinois* v. *Martin et al.*, Sup. Ct. Ill., September 23, 1954, rehearing denied November 15, 1954, Schaefer, C.J., 122 N.E. 2d 245.)

■ Also dealing with the common-law fiction of unity of husband and wife, the Supreme Court of Utah has split three ways in holding that a wife may maintain a tort action against her husband. The wife's action was for an intentional assault committed during the interlocutory period of their divorce.

The Court based its ruling on the state's married women's emancipation statutes and declared that these should be liberally construed to effect changes in the common law intended by the legislature. While the Court conceded that a procedural statute of the state providing that a wife could "sue and be sued in the same manner as if she were unmarried" would not confer a substantive right, it declared that other statutes, when read in conjunction with this, supported the action.

The Court warned that its position would not give rise to a plethora of husband-wife tort actions "for any unwanted caress, kiss or other physical contact as sometimes claimed". Any action based upon ordinary physical contacts between husband and wife would be barred by the consent implied in the marital relationship, the Court explained. That consent might be withdrawn, however, the Court continued, or the consent might not extend to "intentionally inflicted serious personal injuries", in which cases liability would attach.

One judge concurred specially, preferring to confine the Court's ruling to the facts of the specific case: that a right of action existed during the interlocutory divorce period for an intentional tort.

Two judges dissented. They felt that the majority had misapprehended the effect of the state's statutes on the common-law immunity doctrine. The emancipatory statutes, they contended, did not mention tort liability and the Court was not justified in extending them beyond their terms. "Concededly there seems to be little or no logical reason why a wife should be able to recover against her husband for a broken promise but not for a broken arm", they said. "However, it is for the legislature, not us, to give such a right."

(*Taylor* v. *Patten*, Sup. Ct. Utah, October 26, 1954, Wade, J., 275 P. 2d 696.)

Insurance Law . . . *exclusions*

■ Squaring with most other courts that have considered the point, the Court of Appeals for the Eighth Circuit has held that an insured motorist who participates in a share-the-ride deal and receives voluntary contributions from his passengers is not operating a "livery conveyance" within the meaning of that term in a policy exclusion.

The insured had built a housing over the bed of his truck and had installed lengthwise seats. There he transported fellow workers who paid him thirty cents for a twenty-mile round trip. He did not hold his truck out for public hire, nor did he solicit riders. One day an accident occurred, and the riders claimed damages against the insured.

The policy contained the regular exclusion that it did not apply ". . . while the automobile is used as a public or livery conveyance. . . ." The insurer contended the insured's vehicle was being used as a "livery conveyance" and sought to have its non-liability spelled out in a declaratory judgment.

The case was governed by Arkansas law, but since there were no decisions in that state on the point, the Court turned to other jurisdictions and found the substantial precedents to be that a vehicle used in a share-the-ride program is neither a "public" nor "livery" conveyance because it is not used indiscriminately to carry the public, but is limited to certain persons and particular occasions or governed by special terms.

(*Allstate Insurance Company* v. *Roberson et al.*, C. A. 8th, December 7, 1954, Woodbrough, J.)

Labor Law . . . *injunctions*

■ The Norris-LaGuardia Act still bars an employer from obtaining an injunction against his employees in a labor dispute, despite the Taft-Hartley Act's provision that "suits for violation of contracts between an employer and a labor organization" may be brought. This is the decision of the Court of Appeals for the First Circuit in a case involving this point for the first time on the court-of-appeals level.

The complaint alleged that the union was striking as a result of a dispute over hours of employment and that the strike was in violation of an existing collective bargaining contract because the union had refused to submit the dispute to arbitration. The district court denied an injunction on the authority of the anti-injunction provisions of Norris-LaGuardia. But the employer contended that Norris-LaGuardia was repealed *pro tanto* by §301 (a) [29 U.S.C.A. 185 (a)] of Taft-Hartley allowing "suits" against unions. An

action for an injunction is a "suit", it claimed.

The Court agreed with the district court that a "labor dispute" within the meaning of Norris-LaGuardia was involved and that therefore an injunction was barred. The Court noted that since §301 (a) did not specifically mention Norris-LaGuardia, any repeal would have to be by implication and such repeals are not favored. The Court read Taft-Hartley as providing only for employer suits against unions looking toward judgments for damages, and reserving anti-union injunctions for the NLRB in connection with enforcement of its orders.

A similar holding was reached by the United States District Court for the Northern District of California on July 9, 1954, in *Sound Lumber Company* v. *Lumber & Sawmill Workers Local Union*, 122 F. Supp. 925.

(*W. L. Mead, Inc.* v. *International Brotherhood of Teamsters, etc.*, C.A. 1st, November 18, 1954, Magruder, C.J.)

Wills . . .
afterborn children

■ A complex will situation caused by an afterborn child and a renouncing widow has been solved by the New York Supreme Court's Appellate Division, Second Department.

The testator, childless when he made his will, left one half his estate to his wife and one half to collateral relatives. When the testator died, there was an afterborn child, who under New York statute was entitled to two-thirds of the estate to be created from the shares of the "devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will". Creation of the afterborn's two-thirds share would therefore have reduced the widow's and relatives' share each to one-sixth.

The widow then renounced and elected to take her statutory share—one-third of the estate—"as in intestacy". New York law further provides that upon such an election "the will shall be valid as to the residue remaining after the elective share . . . has been deducted. . . ." Treating the afterborn child's two-thirds as a statutory legacy, the surrogate, in order to give the widow one-third, deducted two-fifteenths from the child and one-thirtieth from the relatives and added it to the widow's share. This left the distribution: one-third to the widow, eight-fifteenths to the child and two-fifteenths to the relatives.

The Court held that the surrogate had gone astray in treating the afterborn child's share as being subject to reduction to create the widow's one-third share. Both the child and the widow were entitled to receive their shares as if the testator had died intestate, the Court stated. Thus the proper distribution of the estate, the Court concluded, was one third to the widow and two-thirds to the child, with "nothing left for the relatives".

(*Vicedomini* v. *Vicedomini*, N.Y. S.C., App. Div., 2d Dept., December 6, 1954, Murphy, J.)

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1955 Annual Meeting and ending at the adjournment of the 1958 Annual Meeting:

Arkansas	Nevada
Colorado	New Hampshire
Delaware	New York
Georgia	Ohio
Idaho	Oregon
Indiana	Rhode Island
Louisiana	Utah
Maryland	West Virginia
Minnesota	

Elections will be held in the States of Kansas and Virginia to fill the vacancies for the term expiring at the adjournment of the 1956 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1955 must be filed with the Board of Elections not later than March 25, 1955. Petitions received too late for publication in the March issue of the JOURNAL (deadline for receipt, January 28) cannot be published prior to distribution of ballots, which will take place on or about April 1, 1955.

Forms of nominating petitions may be obtained from Headquarters of the American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. March 25, 1955.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ **In the following article, Mr. Driedger outlines the legislative process in Canada. Lawyers of the United States will be particularly interested in the author's comments on the functions of the Department of Justice and his exposition of the Canadian and English views regarding legislative history.**

The Legislative Process in Canada

By Elmer A. Driedger, Q.C., B.A., LL.B., Parliamentary Counsel, Department of Justice, Ottawa, Canada.

■ The exercise of legislative authority by popular assemblies in an efficient manner is one of the problems inherent in a democratic system of government. Obviously, several hundred people or more cannot be expected to sit around a table in one room and jointly formulate a legislative policy or compose a statute. Nevertheless, you in the United States and we in Canada believe that democratic government is the best; but we must make it work.

In the old Roman republic, laws were framed by the executive and presented to the assembly for acceptance or rejection. In the American republic, as I understand it, the executive does not participate in the framing of legislation or legislative policy—the function of law-making, in all its aspects, belongs exclusively to the assembly, and is effectively exercised by delegating the formulation of policy and the drafting of bills to committees of its own body, who are assisted in their work by technical and expert staffs.

In Canada, following the English system of responsible cabinet government, the executive and legislative branches of government have a common denominator in the cabinet, which initiates legislative policy and, with the assistance of the permanent civil service, frames the measures designed to carry it out, and then presents it to the assembly for acceptance, rejection or modification as the assembly, after full and free discussion and debate, sees fit.

In the following pages I shall attempt to describe briefly the legislative system in Canada, but before doing so, I feel I should, at the risk of being didactic, give an outline of our parliamentary system of government.

Canada is also a federal state, legislative authority being divided between the Parliament of Canada on the one hand, and the legislatures of the provinces on the other. Legislative authority in the national field is vested in Parliament, which consists of the Sovereign, an elected House of Commons and an appointed Senate. The Sovereign is the person who from time to time is the Sovereign of the United Kingdom, and is represented in Canada by the Governor General. Executive authority is vested *de jure* in the Sovereign, but *de facto* in the Canadian Cabinet. There is no connection between the *government* of the United Kingdom and the *government* of Canada; legislative and executive authority of the United Kingdom does not extend to Canada.

The Governor General is appointed by the Sovereign on the advice of the Canadian Prime Minister, and executive authority can be exercised by or in the name of the Sovereign in respect of Canada only on the advice of the Canadian Cabinet or some member thereof, who must assume full responsibility for the action taken. The members of the Cabinet belong to the political party commanding a majority in the House of Commons, and are selected by the Prime Minister, who is the leader of that party. Members of the Cabinet must be members of the Senate or House of Commons, and, in practice, all but one are members of the House of Commons. The maximum duration of a Parliament is five years, but a government can be voted out of office at any time. The Cabinet must at all times command the support of a majority in the House of Commons, and a defeat in the House of Commons on any issue is followed by the resignation of the Prime Minister and his entire Cabinet, and another election. Members of the Senate are appointed for life by the Governor General on the advice of the Prime Minister.

2. *The Origin of Legislative Policy.*

Any member of the Senate or the House of Commons is free to introduce a bill in either House, subject to the rule that money bills must be sponsored by the Cabinet and must originate in the House of Commons. However, a public bill has little chance of being enacted unless it is supported by the government.[1] The government controls the time of the House of Commons and most of it is spent in considering measures placed before the House by the government. For practical purposes, therefore, all legislation (except private bills, as for example, bills for the incorporation of companies) is initiated by the government.

Legislative policy is, in the first instance, settled and determined by the Cabinet. Suggestions for legislation may, of course, originate elsewhere—in the civil service, in representations made to the government by private individuals or organizations, in reports of commissions of inquiry appointed by the government—but the Cabinet determines the policy and decides whether or not legislation should be sponsored to give effect to that policy.

In order to assist in the consideration of legislative policy, a committee of the Cabinet has been estab-

1. The term "government" in this paper is intended to mean the Cabinet, supported by the majority party in the House of Commons.

lished known as the Legislation Committee. The chairman of the committee is the Minister of Justice, who is a member of the Cabinet and is also the Attorney General of Canada. Legislative proposals are submitted to the Cabinet by the ministers in charge of the department or branch of the government concerned, and in the first instance are considered by the Legislation Committee. The minister and officials of his department appear before the Committee, where the proposal is expounded at length and fully discussed. When the Legislation Committee is satisfied that all material has been placed before it, and that the major questions of policy have been identified, the proposal is submitted to the full Cabinet. If the Cabinet approves the proposal, the sponsoring Minister is requested to give to the Department of Justice complete instructions for the preparation of the necessary bill. Instructions may not be given to the Department of Justice for the preparation of a bill until the policy has been submitted to the Cabinet and has been approved.

3. *The Framing of Legislation.*

The Department of Justice is charged with the duty and responsibility of preparing government legislation, and for this purpose a drafting organization exists within the Department, known as the Legislation Section, under the direction of the parliamentary counsel. The Department of Justice prepares bills only for the government and not for private members—any private member intending to sponsor a bill must find his own way of having it prepared. As a rule, instructions in the form of a draft bill are not desired. The function of a legislative draftsman is to give verbal expression to legislative policy; he must ascertain in detail what that policy is, then consider what particular provisions are required to carry that policy into effect. Presentation to him of a draft bill does not relieve him of the necessity of inquiring into the legislative policy and deciding for himself how it should be implemented.

Before the drafting begins, officials of the sponsoring department are called in and cross-examined on the details of the proposed scheme. During the course of the discussions, new points of policy may emerge for decision and it may become apparent that modifications in the prescribed policy will have to be made in order to make it workable. Changes in policy during the drafting stages must be referred back to the minister concerned.

Having acquainted himself with the legislative objectives, and informed himself on the facts and the law, the draftsman now prepares a preliminary draft and submits it to the departmental officials for study and comment. At a further conference the draft is discussed, flaws, defects and difficulties are brought to light, and a fresh draft is prepared. This process continues until both the sponsors and the draftsman are satisfied that the terms of the draft will carry out the prescribed policy.

The bill is then referred to the sponsoring minister, and, if he is satisfied with it, the bill is printed and submitted to the Cabinet. In the first instance, the printed bill is considered by the Cabinet Committee on Legislation and if it has any alterations or revisions to suggest, the bill is revised or redrafted accordingly. When the bill is approved by the Legislation Committee it is considered by the Cabinet as a whole and, if approved, is ready for introduction. The Cabinet may, of course, ask for amendments or a revision before it is satisfied that the measure reflects their policy.

4. *The Legislative Program.*

The process of submitting legislative proposals to the Cabinet and drafting legislation is a continuous one, extending throughout the entire year, although the pressure is obviously greater during a session of Parliament than in the interval between sessions.

One of the functions of the Cabinet Legislation Committee is to ensure that the preparation of all legislation intended for a particular session will be begun in good time so that it will be ready when it is wanted. Ministers are required to forward to the secretary of the Cabinet, not later than ninety days following the prorogation or adjournment of the then current session of Parliament, information as to the legislation proposed for the next ensuing session.

From time to time, the Cabinet Committee on Legislation reviews the position of proposed measures and, approximately one month before the opening of a session of Parliament, the Committee prepares and submits to the Cabinet a tentative legislative program. In preparing this program, the Committee has regard to the amount of time likely to be available for legislation during the session, the relative priority of bills, the dates when instructions were given or can be given to the Department of Justice, the time that the drafting may be expected to take, and the approximate date on which the legislation must be introduced. The tentative program is revised from time to time and on the eve of the opening of the session the final program is drawn up by the full Cabinet, subject only to such alterations and modifications as events of the day require.

5. *The Enactment of Legislation.*

When a bill has been approved by the Cabinet for introduction it is passed to either the House of Commons or the Senate for introduction. Every bill must receive three readings in each House, and the assent of the Governor General, before it becomes law. Once a bill has been introduced, it is regarded as the property of Parliament, and no changes can be made without the approval of Parliament.

The first reading is a formality and no debate takes place, but not until a bill has had first reading is it printed and distributed to members of Parliament. On second reading, the bill is considered either by the House as a Committee of the Whole, or it is referred to a special or standing committee. It is here, in committee, that the government must defend its policy, and it is here that the opposition members have an op-

portunity of criticizing the government and government policy and the form and substance of the legislation placed before Parliament. Amendments are frequently made in committee and, on occasion, the government may even withdraw the measure.

Rarely does legislation originate in a Parliamentary Committee, and when it does it usually relates to Parliament itself, as, for example, elections and salaries of members. But even here, the practice is to refer the matter to the Department of Justice for drafting, if the legislative proposal is acceptable to the government.

Because the bill has now become the property of Parliament, the official government draftsmen no longer have any jurisdiction over it. Nevertheless, they can, and frequently do, assist in the preparation of amendments. If the government intends to move an amendment itself, it is customary to have the amendment drafted beforehand in the Department of Justice; and, if the government is disposed to accept an amendment moved by the opposition, it is usual for the government to agree to the principle of the amendment and to return at a later sitting with an amendment as prepared or approved by the Department of Justice.

Government officials are permitted to attend committee meetings. When the House sits as a committee of the whole, government officials cannot participate in the discussions, but they are permitted to be present and can, by memoranda or by whispering, give assistance to the minister who is piloting the bill. In a special or standing committee, officials, when called upon, are free to speak. Officials of the Department of Justice frequently attend and can assist either in explaining some of the legal aspects of the bill or in preparing amendments. Draftsmen, however, are not anxious to prepare amendments in committee on the spur of the moment, but would prefer to take a suggested amendment back to their own desks.

6. *The Use of Legislative History.*

It will be seen from the foregoing that the work of the draftsman is substantially completed by the time Parliament first sees the legislation. It is for this reason, perhaps, that in Canada, as in England, a rather dim view is taken of the suggestion that legislative history should be admitted in evidence to show the intent of or to explain statutes.

Legislative history—that is to say, an account of the circumstances and considerations that gave rise to the measure, and of how it took shape—does not exist as a matter of record. If it exists at all, it exists in a multitude of confidential government files, unrecorded Cabinet discussions, telephone conversations and conferences, and faded recollections of the draftsman's cogitations.

The debates in the Senate and House of Commons are officially recorded, but, obviously, no one who speaks to the measure (except some of the members of the Cabinet) has any knowledge of its preceding history. A member can discuss the bill only on the basis of his interpretation of it, which may or may not be correct. The members of the Cabinet, on the other hand, are concerned more with the immediate problem at hand, namely, getting the bill through the House and securing its popular acceptance, than with settling future legal interpretations of the statute on facts that have not yet arisen, and the private member, either in the House or in committee, applauds or assails the measure for what it says, and not for what the Ministry says about it. And when Parliament adopts the measure, the written words therein become the law, and not the conversations that took place beforehand or the political bricks or bouquets that were showered on the bill when it ran the parliamentary gauntlet.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ "Introducing Your Lawyer" is the title of a new pamphlet prepared by the Public Relations Committee of the Bar Association of the State of Kansas. The pamphlet discusses such questions as "Who Is a Lawyer?", "What Are His Duties?", "When Are the Services of a Lawyer Needed?", "How Do Lawyers Charge for Their Services?" and "The Attorney-Client Relationship".

■ The Committee on Local Bar Association Activities of the Ohio State Bar Association sponsored in December at Columbus an "Unauthorized Practice Workshop". Warren Resh, Assistant Attorney General of Wisconsin and Editor of *Unauthorized Practice News*, spoke on "Problems and Procedures in Curbing Illegal Practice of the Law".

■ In November the Milwaukee Junior Bar Association held its fall smoker program with the principal address being given by Alfred E. LaFrance on "A Lawyer's Impression of Military Justice". The Junior Bar Little Theater Group presented "New Cases of 1954", a musical satire on law practice and courthouse procedure. The Award of Merit of the Junior Bar Conference of the American Bar Association was presented by Stanley B. Balbach, Chairman-Elect of the Junior Bar Conference.

■ Over 4,000 people attended legal forums sponsored by the St. Petersburg Bar Association (Florida) and the *St. Petersburg Times*. Panels discussed "The Legal Aspects of Real Estate", "Legal Problems of Landlords and Tenants", "Wills and Estates" and "The Family's Legal Problems". Radio Station WTSP transcribed each program for later broadcast. William McLeod was Chairman of the Association's Committee in charge of the forums.

Lancie L. Watts

■ The election of officers was the only business conducted at a pre-Christmas meeting of the Lawyers Association of Kansas City (Missouri).

Lancie L. Watts, a member of the Kansas City Bar for thirty-six years, was elected president, Floyd R. Gibson was elected Vice President, O. T. Thomsen, Secretary, and Robert P. Lyons, Treasurer. Lowell Knipmeyer and Dick H. Woods were elected to the Board of Directors.

The meeting ended with entertainment and the singing of Christmas carols.

■ At the November Mid-Year Meeting of the Illinois State Bar Association a humorous skit, "Marital Discord and Fiscal Bliss", was presented by the Section on Federal Taxation. Other sections of the Association presented discussions on changes in the Civil Practice Act, jurisdictional problems in labor relations, current problems in antitrust, public utilities practice and workmen's compensation. Dr. Leland Carlson, President of Rockford College, spoke to the ladies attending the meeting on the subject "Travel Is a Pleasure".

■ The Richmond, Virginia, Bar Association entertained Chief Justice Earl Warren, Lord Goddard, the Lord Chief Justice of England, and Mr. Justice Harold H. Burton, Associate Justice of the United States Supreme Court, in September, with a reception at the John Marshall House and with a dinner at the Commonwealth Club.

The distinguished jurists were in Richmond for the ceremonies marking the one hundred and fortieth anniversary of the founding of the Monumental Episcopal Church, and the one hundred and ninety-ninth anniversary of John Marshall's birth. Chief Justice Marshall was one of the founders of the Monumental Episcopal Church of Richmond, Virginia. The year-long celebration honoring Chief Justice Marshall began the day prior to the visit to Richmond, at Williamsburg, where the renamed Marshall-Wythe School of Law was dedicated.

At the John Marshall House, the visitors were conducted on a tour of the home of Marshall by the ladies of the Association for the Preservation of Virginia Antiquities, owners and preservers of the property. The reception held at noon was followed by a dinner at the Commonwealth Club, which was attended by over 250 members of the Bench and Bar with their ladies. Among the out-of-town guests attending the celebration were Dr. Arthur L. Goodhart, master of the University College, Oxford, representing Lord Blackstone's contribution to Anglo-American jurisprudence, President Alvin Duke Chandler, of the College of William and Mary, Mrs. Alfred I. du Pont, of Wilmington, Delaware, Judge David A. Pine, of the United States District Court of the District of Columbia, Dean F. D. G. Ribble, of the University of Virginia Law School, William Rosenberger, Jr., President of the Virginia State Bar, Michael Wagenheim, President of the Virginia State Bar Association, Dean Clayton E. Williams of the Washington and Lee Law School, Dean Dudley W. Woodbridge, of the Marshall-

Wythe School of Law, College of William and Mary; Justice Lemuel F. Smith, Justice Willis D. Miller, and Justice Kennon C. Whittle, of the Virginia Supreme Court of Appeals, and several lineal descendants of Chief Justice John Marshall.

■ Theodore R. Kupferman, of New York City, was installed as President of the Federal Bar Association of New York, New Jersey and Connecticut at a luncheon held in New York City in November. Mr. Kupferman succeeds Bernard A. Grossman, who served as President for the past two years. At the luncheon the featured speaker was Governor Robert B. Meyner, of New Jersey. Dean John F. X. Finn, of the Fordham Law School, presented on behalf of the Association an illuminated scroll to Federal Judge Edward A. Conger, who announced his retirement in November. Presiding Justice David W. Peck spoke briefly and Joseph A. McDonald presented the Association's award to Herman Finkelstein, Sydney M. Kaye, Edward A. Sargoy, John Schulman and posthumously to Arthur E. Farmer for their successful contribution to the Universal Copyright Convention.

Mollie STRUM

■ Mollie Strum has been elected the new President of The Federal Bar Association, Empire State Chapter. Miss Strum is a trial attorney with the United States Department of Justice and has tried customs cases throughout the United States. Prior to this assignment Miss Strum represented the United States in anti-trust cases. Miss Strum is a member of the Committee on Arbitration of The Association of the Bar of the City of New York, and is a member of the American Bar Association, the New York Patent Law Association, the National Association of Women Lawyers and the Women Lawyers Association of the State of New York.

In November The Federal Bar Association sponsored its third annual customs symposium. Among the speakers were Webster J. Oliver, Chief Judge of the United States Customs Court; Robert W. Dill, Collector of Customs, Port of New York; Philip A. Ray, General Counsel, U. S. Department of Commerce, Washington, D. C.; Geoffrey Parker, Counsellor to the British Embassy, S. Krishnamurti, First Secretary of the Embassy of India; Y. Levit, Consul of the Government of Israel; and Gil J. Puyat, Chairman of the Committee on Finance of the Senate of the Republic of the Philippines and Vice Chairman of the Philippine Economic Mission to the United States.

ANNOUNCEMENT

of the 1955 Essay Contest Conducted by the

AMERICAN BAR ASSOCIATION

Pursuant to the terms of the bequest of Judge Erskine M. Ross, deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted: On or before April 1, 1955.

Amount of Prize: Twenty-five Hundred Dollars.

Subject To Be Discussed:

"The Scope of the Phrase 'Interstate Commerce'—Shall It Be Redefined?"

Eligibility:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1955 (except previous winners, members of the Board of Governors, Officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured upon request to the American Bar Association.

AMERICAN BAR ASSOCIATION

1155 East Sixtieth Street Chicago 37, Illinois

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, John W. Ervin, Chairman; John S. Nolan, Vice Chairman.

Elimination of the "Premium Payment" Test in the Estate Taxation of Life Insurance Proceeds

■ The 1954 Internal Revenue Code has made important changes in the estate taxation of life insurance proceeds which are of interest to every lawyer, both professionally and personally.

Under the old law (§811 (g)) the principal sum of life insurance was included in the estate of the insured if (a) the insurance was payable to the estate; or (b) to the extent that premiums on the policy were paid by the deceased; or (c) where incidents of ownership were retained by the deceased. Under the new law, insurance will be included in the estate of the insured only if it is payable to the estate or the insured held incidents of ownership with respect to the policy at the time of his death.

Under the old statute, estate planners sought to keep insurance out of the estate of an insured by arranging for payment to a specified beneficiary and arranging to have premiums paid, and incidents of ownership held, by some person other than the assured. In such cases the life insurance proceeds escaped estate taxation. Often, however, only the insured had funds available for the payment of premiums, and the need for cash at death was so great that the estate tax was not too high a price to pay in order for the estate to obtain the proceeds. Since the value of the policy was includible in the decedent's estate anyway, the incidents of ownership of the policy were reserved to the insured who paid the premiums. The term "incidents of ownership" includes, in the language of the Regulations (Reg. 105, §81.27 (c)): ". . . the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc." Since payment of premiums is no longer relevant, counsel should devote immediate attention to the desirability of excluding the insurance from the estate by having the insured give up any incidents of ownership which he possesses and name a specific beneficiary rather than his estate.

There can be little doubt of the general desirability of this procedure from an estate tax viewpoint. There are, however, several practical, legal and tax problems involved.

Controls over incidents of ownership. Since the release of the insurance proceeds from tax is dependent upon the relinquishment of all incidents of ownership by the insured, it is appropriate to reemphasize some of the legal concepts related to the term. Congress has emphasized that a taxpayer cannot be said to have relinquished incidents of ownership where he has assigned them to a corporation of which he is the sole stockholder (H. R. Rep. No. 2333, 77th Cong. 2d Sess. 163 (1942)) and this view has been incorporated in the Regulations (Reg. 105, §81.27 (1) (2)). Also, Section 2042 now contains two provisions which make the operation of the statute with respect to life insurance consistent with the operation of other sections of the estate tax relating to other transfers with testamentary motives. Retention of a reversionary interest in a life insurance policy (evidenced by incidents of ownership) will suffice to bring the insurance into the estate "only if the value of such reversionary interest exceeded 5% of the value of the policy immediately before the death of the decedent". Also, as distinguished from prior law, all reversionary interests of the insured are included, subject to the above limitation. The operation of Section 2042 is thus coextensive with Section 2037. And, irrespective of incidents of ownership, the property will be placed in the insured's estate if there is a legally binding obligation on the recipients to apply the proceeds to the payment of his debts. This may arise where premiums were paid in fraud of creditors. (Reg. 105, §81.26). If the insured does not effect a complete assignment of the policy a careful check of all of the provisions of each policy should be undertaken by counsel, with the aid of a competent insurance underwriter, to make sure that all incidents of ownership have been transferred away from the decedent when an attempt is made to qualify the insurance proceeds for the tax benefits available under the new statute.

Gift tax consequences. It may not always be advisable for an insured to give up his incidents of ownership. If, having paid the premiums, he gives away his interest in the policy by assignment of the policy or by naming another irrevocably as beneficiary, he will consummate a gift at the time of the transfer. *Goodman* v. *Commissioner*, 156 F. 2d 218 (2d Cir. 1946). This will be valued at the replacement cost of the policy. *United States* v. *Ryerson*, 312 U.S. 260 (1941). To the extent that he continues payments after the date that the policies are transferred, he will make annual gifts ". . . to the extent of such premium. . . ." (Reg. 108, §86.2 (a) (8)).

Finally, the same problems with respect to making a gift of the insurance policy which arise with respect to any gift of property: The husband may give the policy to the wife; the

wife may die first, in which event the policy will be included in her taxable and probate estate; if the husband is her heir the policy will then come back to him. In such a case all of the following might be incurred: a gift tax when he gave the policy to his wife and when he thereafter paid premiums; an estate tax (subject to the marital deduction in certain cases) when the wife transmitted back to him by will her interest in the policy; and another tax when the husband either gave the policy away again to a third party or died leaving the proceeds of the policy to be included in his estate for estate tax purposes.

Gifts of future interests. The $30,000 exclusion applies, of course, to gifts of life insurance as well as other property interests. It is probable that both the original transfer and subsequent annual payment of premium would qualify for the annual $3,000 exclusion from net gifts. This exclusion is not available where a transfer of a "future interest" is involved. Presumably the exclusion is available, however, if the insured "divested himself of all his present interest in the policies". *Edwin Goodman,* 41 B.T.A. 472 (1940); see also Bayly, *Gifts of Life Insurance and Annuities as Future Interest,* TAX NOTES 40 A.B.A.J. 877 (1954), and cases cited.

Contemplation of death. Another potential source of trouble where an insured assigns his interest in the incidents of ownership of a policy is that the transfer may be deemed to have occurred in contemplation of death. When the transfer is made, such life motives as may properly be associated with it should be catalogued; although prospects for successfully resisting such an allegation are by no means good. (For an excellent and exhaustive discussion of this subject see Guterman, *Transfers of Life Insurance and The Federal Estate Tax,* 48 COL. L. REV. 37 (1948)).

Use of the life insurance trust. Perhaps the most significant change in estate planning which will result from the elimination of the premium funded life insurance trusts were popular where members of the family, exclusive of the insured, had financial means to carry insurance on his life. For example, the wife of the insured might purchase insurance policies on her husband's life and put them in trust together with stocks sufficient to pay the premium thereon, giving the incidents of ownership to the trustee. She accordingly made a completed gift to the ex- payment test concerns the use of life insurance trusts. Under the new statute it is necessary for the insured who pays premiums on his insurance to give up all rights of control in the policy. Frequently, the beneficiaries of the policy will be minors or persons of immature judgment. It will often be unwise for the insured to transfer irrevocably to them the right, for example, to borrow on the insurance or to cash it in. The obvious answer to this problem is for the insured to create a life insurance trust making the policies payable to the trustee, who will also hold all incidents of ownership therein. The trustee may be given powers to distribute the proceeds of the policy at the death of the insured within such limitations as the insured desires to place in the trust instrument. As long as the trustee does not have the power to make the trust proceeds payable to himself, his creditors, or his estate, the exercise of his power of appointment will not create gift or estate tax liability. Sections 2041, 2514. Since no income tax problems are involved, the trustee presumably may be the wife, a close relative, or employee of the insured so that for practical purposes power to designate the ultimate beneficiary will be retained by the insured through his trustee. Such an arrangement, however, may run aground on the judicial rocks of "substance versus form" on "the family solidarity" principle.

An additional deficiency in such a procedure arises to the extent that the insured continues payment of premiums during his life. Where the trust device is not used, the payment of premiums will usually qualify for the $3,000 exclusion. But the exclusion will almost certainly be lost as to payments made in cases where the ultimate beneficiaries are not irrevocably designated. (See Bayley, *Gifts of Life Insurance and Annuities as Future Interests, supra.)*

Cases in which payment of premiums is still relevant to estate planning. Payment of premiums may still be significant notwithstanding the new amendment. Before the new law, tent of the value of the stock and insurance policies at the time the trust was set up. As noted above, since beneficiaries were to be determined by a trustee, flexibility in the trust was maintained although the property was not included in the husband's estate. The dividends received by the trustee on the stock were not taxed to the wife since under Section 167, the earlier counterpart of Section 677, income from property in a trust was taxable to the settlor where used to pay life insurance premiums only respecting policies on the life of the settlor. (However, the income received by the trustee might still be taxed to the wife if the old Clifford regulations (now codified) are violated. Section 674). Where there is no violation, the income from the stocks is taxable to the trustee at lower rates rather than taxable to the wife at, presumably, higher rates. For estates in which the use of a funded insurance trust is indicated, it may still be advisable to have the trust set up by the person who is not insured, since otherwise the trust income would be taxed to the settlor.

Moreover, the question of whether premiums were paid by the insured may still be relevant in some circumstances involving residents of community property states. If a husband pays premiums from separate funds in a community property state and retains the incidents of ownership with respect to the property the entire proceeds of the insurance are included in his estate for federal estate tax purposes. If, however, he has purchased the insurance with community funds and retains any or all of the incidents of ownership at

the time of his death, only half the policy is included in his estate. This result was reached under Rev. Rul. 48 (I.R.B. 1953-7, page 8) because the husband would be required to act as the agent of the wife as to the one half of the policy attributable to the wife's funds since purchase was made from community property. It was pointed out that in the states affected (Texas and Louisiana) the one half of the policy attributable to the wife became an absolute gift by the wife upon the death of her husband. It was also pointed out that if the wife predeceased the husband, one half of the cash surrender value of the policy would be includible in her gross estate as her interest in a community asset or as a revocable transfer under what is now Section 2038 of the Code.

It should be apparent from the foregoing discussion that, while the new estate tax provisions relating to life insurance offer many tax saving opportunities, they may also give rise to many tax problems in common estate planning transactions.

Contributed by committee member, Professor Ralph S. Rice.

Two Significant Decisions

(Continued from page 124)

cerning loyal territory in a combat zone.[17]

This significant decision, exercising the right of final review of the constitutional limitations of executive and legislative authority, has a unique sequel in *Ex parte McCardle*.[18]

The story of this sequel begins February 5, 1867, when Congress expressly provides for the issuance of writs of habeas corpus by federal courts when persons are restrained of their liberty in violation of the Constitution or of any treaty or law of the United States. The Act also states specifically that appeals may be taken from the Circuit Courts to the Supreme Court in habeas corpus cases.[19] Not long thereafter, McCardle, who is a newspaper editor in Mississippi, is arrested and held for trial before a military commission under one of the Reconstruction Acts. The principal charges against him are libel and those of inciting to insurrection, disorder and violence. Promptly, he petitions a Federal Circuit Court for a writ of habeas corpus under the 1867 Act. When the Circuit Court remands him to military custody, he appeals to the Supreme Court. In January, 1868, his counsel, Jeremiah S. Black, moves for a speedy hearing. The Court, however, puts off the hearing until the first Monday in March, 1868.[20]

Radical Reconstructionists begin to fear that the Court may hold unconstitutional legislation upon which the jurisdiction of the military commission depends. Accordingly, they seek, by legislative action, to avert such a decision. First, they induce the House to pass a bill requiring a two-thirds vote of the Supreme Court to declare any act unconstitutional. The Senate, however, is not responsive. Next they propose a bill to deprive the Supreme Court of appellate jurisdiction over any case arising out of the Reconstruction Acts. That bill also languishes.

The *McCardle* Case . . . *The Court's Achilles' Heel*

Monday, March 2, the arguments on the merits of the *McCardle* case begin in the Supreme Court. Because Justice Wayne has died, only eight Justices are present. Six hours are allowed each side. Black and Field speak for McCardle. Senator Lyman Trumbull, of Illinois, and Matthew Hale Carpenter, later to be a Senator from Wisconsin, represent the Government. March 9, the Court takes the case under advisement and seems likely to postpone further action until the next term because Chief Justice Chase has been called from the Supreme Court Bench to preside over the impeachment trial of President Johnson. What the decision would have been on the merits of that case, we shall never know. Watchful of their opportunities, supporters of the Reconstruction program quietly secure the passage in the House of an amendment to an inconspicuous bill. If adopted, that amendment will repeal the appellate jurisdiction of the Supreme Court under the Habeas Corpus Act of 1867, even as to pending cases, and thus deprive the Court of its jurisdiction over the *McCardle* case. The Achilles' heel of the Supreme Court's right of judicial review is thus disclosed. The weakness lies in the fact that the Constitution does not give the Court absolute appellate jurisdiction. The Constitution confers appellate jurisdiction on the Court only "with

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PRINCIPAL REFERENCES

Ex parte Vallandigham, 1 Wall. 243.
Ex parte Milligan, 4 Wall. 2, and see 3 Wall. 776.
Ex parte McCardle, 7 Wall, 506, and see 6 Wall. 318.
Duncan v. *Kahanamoku*, 327 U. S. 304.
Madsen v. *Kinsella*, 343 U. S. 341.
Ex parte Merryman, Fed. Cas. No. 9,487.
Milligan v. *Hovey*, Fed. Cas. No. 9,605.
Habeas Corpus Act of March 3, 1863, 12 Stat. 755.
Suspension of Habeas Corpus, Proclamation of September 15, 1863, 13 Stat. 734.
Habeas Corpus Act of February 5, 1867, 14 Stat. 385.
Repeal of Right of Appeal to Supreme Court in Habeas Corpus Cases, 15 Stat. 44.
Clayton, REMINISCENCES OF JEREMIAH SULLIVAN BLACK (1887) 126-134.
Fairman, MR. JUSTICE MILLER AND THE SUPREME COURT (1939) 84—89, 90—97.
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Foster, *The Suspension of the Writ of Habeas Corpus*, 3 VA. L. REG. (N. S.) 665-672 (1918).
1 Foulke, LIFE OF OLIVER P. MORTON (1899) 387-432.
Hart, SALMON PORTLAND CHASE (1899) 342—346.
Hughes, *War Powers Under the Constitution*, *A.B.A. Annual Meeting* (1917), S. Doc. No. 105, 65th Cong., 1st Sess. 11—12.
Hughes, THE SUPREME COURT OF THE UNITED STATES (1927) 108—110.
Klaus, AMERICAN TRIALS, EX PARTE: *In the Matter of Lambdin P. Milligan* (1929).
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2 Warren, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed., 1937) 364—374, 418—497.
Wyzanski, *The Writ of Habeas Corpus*, 243 ANNALS AM. ACAD. POL. AND SOC. SCI. (1946) 101—106.
BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1950).
2 DICTIONARY OF AMERICAN BIOGRAPHY (1929).

17. See *Duncan* v. *Kahanamoku*, 327 U. S. 304.
18. 7 Wall. 506. Justice Wayne died in 1867, leaving a court of eight members to hear and decide this case.
19. 14 Stat. 385.
20. In the meantime, Black successfully resists a motion to dismiss the appeal as not covered by the Act of 1867. *Ex parte McCardle*, 6 Wall. 318.

such Exceptions, and such Regulations as the Congress shall make".[21]

The amendment passes the Senate. President Johnson at once sees in it grave danger of a precedent for congressional manipulation of the Court's jurisdiction. With high courage, in the midst of his own impeachment trial, he vigorously vetoes the bill. This forces the issue into the open, only to have a hostile Senate pass the bill over his veto 33 to 9, with thirteen Senators absent. The House of Representatives follows suit, with a vote of 115 to 57, thus providing a margin of one vote above the constitutionally required two-thirds.

On March 27, only eighteen days after the argument of the appeal in the *McCardle* case, the Court's jurisdiction to hear such appeals is thus cut off by Congress.[22] Despite this, Jeremiah Black asks to be heard in opposition to the right of Congress thus to enter the field of pending litigation in a case already submitted to the Court. Following a sharp controversy within the Court, such a hearing is put over until the next term.[23] Final argument is had March 19, 1869, and, April 12, the Court unanimously concedes its loss of jurisdiction.[24]

The weakness thus demonstrated in the Court's armor is a matter of continuing concern. To overcome it, the Senate, at a recent session, in 1954, included in S. J. Res. 44 a proposal for a constitutional amendment guaranteeing to the Court appellate jurisdiction in all cases arising under the Constitution and limiting to "other cases" the right of Congress to make exceptions to the Court's appellate jurisdiction. The House of Representatives did not vote upon the resolution before adjournment. To be deserving of such confidence is one of the Court's highest responsibilities.

21. Art. III, § 2.
22. 15 Stat. 44. Section 2 provides "That so much of the act approved February five, eighteen hundred and sixty-seven . . . as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed."
23. 2 Warren, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed., 1937), 482.
24. 7 Wall. 506. See also, Martig, *Congress and the Appellate Jurisdiction of the Supreme Court*, 34 MICH. L. REV. 650.

A Threat to the Constitution

(Continued from page 149)

This treaty subjects soldiers of the United States serving on foreign soil to the criminal and civil laws of the nation they are sent to defend and surrenders their constitutional rights as citizens of the United States. How does it work? Let's take the case of Private Keefe, a drafted G.I. with a wife and two small children in this country.

Private Keefe received a five-year prison sentence under French law for an offense that would have merited only a summary court martial under military law.

Prior to the North Atlantic Treaty an American soldier would be subject to discipline by court martial for such an offense under the Uniform Code of Military Justice; he would represent the sovereign power of the United States on foreign soil—now he surrenders his constitutional protection because he is drafted to fulfill the obligations of a treaty in time of peace.

The continued progress of the people of the United States cannot be disassociated from their freedom under the Constitution. As was said by Gladstone:

> I have always regarded that Constitution as the most remarkable work known to man in modern times to have been produced by the human intellect, at a single stroke (so to speak), in its application to political affairs.
>
> [William Ewart Gladstone—Letter to Committee in charge of Celebration of the Centennial Anniversary of American Constitution, July 20, 1887].

Has the sovereignty of the United States under the Constitution reached a crossroad where we must choose between freedom and world government? Many of us who have lived through three wars—two of them so-called World Wars—do not believe so. But there are many individuals and groups who disagree. Only recently a two-day conference of world government advocates held forth at the University of Minnesota. The keynote of that meeting was voiced by a University professor of a Western state in declaring: "Federalism does not fit the facts of complex American life" and "Survival is more important than sovereignty".

The latter statement applied to the American people means "Survival is more important than Freedom".

The same view was there expressed by numerous other advocates of world government or world federalism of one sort or another.

Let no one tell you that these threats to the sovereignty of the United States are ideas of unorganized radicals. They represent the purpose of a wide variety of organized, well-financed world-planners, many of whom were present at the University meeting.

They hope to write their ideas into the Charter of the United Nations when it is open for revision in 1955. The *Minneapolis Star* of January 11, 1954, carried an article by Grenville Clark on its editorial page. An editor's note describes Mr. Clark as a distinguished New York lawyer who "has concerned himself almost exclusively for the past eight years with studies for organization for peace". His twelve propositions for revision of the United Nations Charter machinery include the following:

> A plan of taxation whereby the United Nations can raise adequate funds . . . a detailed plan for the organization and command of United

Nations military forces. . . .

What becomes of the powers of Congress under our Constitution "to lay and collect taxes" and of the President to "be Commander-in-Chief of the Army and Navy of the United States"?

As was aptly quoted by an eminent British publicist when an international army was proposed during the drafting of the Covenant of the League of Nations in 1919: *"Quis custodiet ispos custodes?"*

The old question therefore arises, . . . Who will keep in order those who are to keep the world in order?

If these changes in our sovereignty are to come about, let's do it in the way provided by the Constitution, by amendment of that document and not under the treaty-supremacy clause by action of international organizations.

These are turbulent and confusing times, especially for young people with the hopes and dreams of life before them. But their safety lies in taking a look backward to a landmark and then charting the future course.

Our Constitution has withstood many attacks but it has survived them all for it is founded on basic principles governing human conduct and not on omnipotence of man.

In closing let me leave with you the text around which Dean Manion, of Notre Dame, wrote *The Key to Peace*—

"Remove not the ancient landmarks which thy Fathers have set."

The Virtues of the Pennsylvania Plan

(Continued from page 143)

a dozen or more judicial candidates. Think of the sea of troubles in which he finds himself in trying to determine those candidates with the best legal attainments, character and judicial temperament. This is what we ask of 1,050,000 people in Philadelphia—the number qualified to vote.

In Pittsburgh, the 1953 election presented thirty-four candidates on the ballot, including the offices of mayor, members of Council, sheriff, coroner, clerks of courts, jury commissioner, and ten candidates for six judgeships. Former Judge James H. Gray, of the Common Pleas Courts, has said the judicial candidates "were nothing more than a tail on the party kites". (*Philadelphia Legal Intelligencer,* January 25, 1954.) This does not elevate the judiciary and place it on the same high level of the other departments of government, as intended under the Anglo-American system.

The political machine exists in every large city. In some, it is Democratic, in others Republican. It is always at its task reaching for posts for its workers even though frequently adverse to public interest. It thrives on patronage and is managed and manipulated by a professional or a group of professionals.

The Elective System . . . *Democratic Only in Theory*

The present elective method is democratic in theory only. Ex-Governor Alfred E. Smith, an authority on the practical side of government, said, "In the long run [the elective system] means the selection of judges by political leaders and the ratification of their selection by an electorate who are not really in a position to pass upon the legal and other abilities of the individual."

Nowhere in the world are judges *elected* except in the United States, some local courts in Switzerland and in what is known as the Peoples Court of Russia. We did not adopt this elective method until three-quarters of a century after the Declaration of Independence. It came into vogue during the Jacksonian Era, but the swing is now definitely away from this elective method, with twenty-five states seeking judicial selection reform.

Political leaders, and not the public, are given recognition in the selection of judicial candidates.

Lawyers who by experience know judicial timber are given no true recognition.

What opportunity does the public have to present candidates for judicial office?

What method is used to screen candidates?

What chance does a man fitted for a judgeship have, on ability only?

We have a more democratic idea. The heart of our plan is the Commission, and when a vacancy occurs the fact is advertised. Names for judicial office may be submitted to the commission orally or in writing. A person may submit his own name. Questionnaires are used. After the time for submitting names has passed, the names are published. The public may express to the commission their approval or disapproval of any candidate. The commission considers all information obtainable about persons under consideration. Finally three names are sent to the Governor; at the same time, they are published. This gives citizens another opportunity to register their feelings by communicating with the Governor before he makes his choice. The public participates directly, becomes acquainted with the final selection, may follow the judge's records, and be in a position to vote on it when he later appears on an understandable judicial ballot.

The Missouri Story . . . *The Politicians' Defeat*

It is to Missouri's everlasting fame that she removed from her courts the iron grip of a political machine and substituted a system that has become a paragon.

The history is instructive. In the

1930's the late T. J. Pendergast controlled politics in Missouri. Very few could be elected Governor, U. S. Senator, Supreme Court Judge, and in many instances, congressmen, without his endorsement. In 1938 a judge named James M. Douglas, who had been named to fill a Supreme Court vacancy, sought election to the court. He had been antagonistic to Boss Pendergast who put up his own candidate. Thanks to a strong, defiant and rigidly honest Governor, Lloyd C. Stark, Douglas's campaign manager, Douglas won. That fight stirred the people of Missouri. They formed a group of one hundred laymen and fifty lawyers known as the Missouri Institute for the Administration of Justice, which sought the adoption of the plan recommended by the American Bar Association in 1937. Through an alert press and a militant drive by progressive lawyers and civic organizations, the non-partisan judiciary plan was explained to the people. At the general election in 1940, it was adopted as an amendment to the State Constitution by a majority of 90,000 persons.

The Plan was mandatory as to the Supreme Court, the three Courts of Appeal and the Circuit and Probate Courts of Jackson County (Kansas City) and the City of St. Louis. As to the other thirty-six Circuit Courts, the Plan is optional.

The politicians of Missouri were astounded, as were many members of the legislature. They thought the people had made a mistake. Consequently, when the legislature went into session after the adoption of the Plan, it proposed a constitutional amendment to defeat the Plan and submitted it to the people in the 1942 election. This time, the people of Missouri just doubled the majority by which they adopted the Plan the first time. It carried by 180,000 votes. Thus the people of Missouri spoke twice in no uncertain terms.

The Constitutional Convention of Missouri which met in 1943-44, took up the Plan and debated it at length, but when they drew up the new Constitution, it was again adopted with more judges being placed under it. The voters of the state have spoken three times and each succeeding time with increased approval.

Shortly after the Plan was adopted in 1940, it was put to a severe test. At that time, Forrest C. Donnell, a Republican, was elected Governor of Missouri by a majority of 3,000 votes. The Democrats, who then controlled the legislature, contrary to the terms of the Missouri Constitution, refused first to seat Donnell as Governor and then conducted a contest. Whereupon Donnell filed in the Supreme Court a mandamus suit against the House of Representatives to compel them to publish the election returns which, on the face, made Donnell Governor. It so happened that all seven members of the Supreme Court had previously been elected as Democrats, long prior to the adoption of the Missouri Plan. Nevertheless, the decision of the Court was unanimous in favor of Donnell, the Republican, against Daniel, the Democrat. Under the old elective system, all of these seven members of the Court would first have had to run in a Democratic primary to be nominated and, if successful, then be the Democratic candidates at the general election.

Politicians who had sufficient influence to keep the legislature from recognizing Donnell certainly could have caused each of the seven judges, when they came up for reelection, considerable trouble and might have prevented many of them from being nominated and elected.

Under the new court plan, these judges did not have to face a primary election and neither would they run as Democrats in the general election, but they would be non-partisan, running solely on their respective records, with no opponents on a separate judicial ballot, without party or political label, the sole issue being whether their records justified their retention in office. Hence, when the decision was rendered, these seven judges did not have to bother about politics nor worry about political leaders, bosses or committeemen.

Numerous appointments have been made under the Plan.The public and Bar have both been highly pleased with them and are satisfied that the appointees are thoroughly qualified for the judicial positions.

Chief Justice James M. Douglas of the Supreme Court of Missouri, who opposed the Pendergast candidate in 1938, in an article written in 1947 on the Missouri Plan tells us how it has worked in Missouri:

> In the seven years the plan has been operating, only lawyers and laymen of high character and integrity have been selected as members of the Judicial Commission. In that interval, we have had a Democrat as Governor, then a Republican, now a Democrat. During the same interval, no selection by any Commission has ever been criticized by the Bar or the press, although nominations to fill nine vacancies have been made. In every instance, all of the nominees have been widely and generally approved. Choosing men of character, ability, learning and industry has been the rule.
>
> Lawyers with successful practices but no political bent have been induced to give up the practice and come on the bench. A campaign over a state as large as Missouri for office on the Supreme Court has seldom proved to be an attraction to the successful, learned, studious practitioner, but by the present plan, men of such type are being added to that court. . . .
>
> In 1944, Judge Laurance M. Hyde of the Supreme Court and I ran for reelection. He is a well-known Republican; I am a Democrat. Judge Hyde's brother had been a Republican Governor of Missouri and later the Secretary of Agriculture in President Hoover's Cabinet. The name of Hyde is one which has long been prominently and honorably associated with Republican politics. In that election, the State went Democratic. Yet Judge Hyde polled about the same vote as I did in our overwhelmingly Democratic Counties known as Missouri's "Little Dixie", and I ran about even with Judge Hyde in the solidly Republican Counties.

The heart of the Plan is the Commission. The men who have served on it in Missouri worked faithfully and successfully. They have included a newspaperman, an undertaker, a merchant, a real estate man and a banker. The lawyers have included a fine criminal lawyer, a corporation lawyer, and a man best described as a legal Jack-of-all-trades from the Ozarks.

It is well balanced with three lay-

men, three lawyers and a judge.

Do they not better qualify than our present agency—the political leaders?

Pennsylvania's Plan . . . *In Answer to Mr. Teller*

In advocating the present system, Mr. Teller makes these admissions:

(1) The elective system does not work in the large cities in the selection of judges of the highest caliber.

(2) It leads to political campaigning for judicial office of the worst type. His illustration of this point represents a complete condemnation of the elective system, in which he states that, in Detroit, judicial candidates used billboard slogans, show girls and remission of salaries as electioneering devices.

(3) Public reaction to the plan in Missouri has been favorable. "The people of Kansas City and St. Louis wanted a change. They got it and they are pleased with what they got."

From Mr. Teller's argument it would appear he approves of no method. As evidenced above, he is critical of the present elective method and he only takes a few pot-shots at the Pennsylvania Plan without striking at its principle. His one criticism is that the governor can reject a panel named by the judicial commission, and require additional panels. This is a detail of operation and not a question of principle.

Answering this objection, the Plan is a system of checks and balances, in which the public, the Bar, the judiciary and the governor all play their parts. Our version assigns a substantial role to the governor. It is entirely conceivable that there could be instances where the governor should demand from the commission a second panel. The argument over the degree of the governor's participation in the selection process can become endless. If the governor tries to vitiate the Plan by requiring too many panels, the spotlight of publicity will quickly focus upon him.

Next, through the quotation of a state senator's speech, comes the argument against extending the governor's power in selecting judges, who should comprise an independent element in government, consistent with the doctrine of separation of powers. The Pennsylvania Plan, however, is a *check*, not an extension, on the governor. The present system, permitting the governor to make appointments to unexpired terms, stultifies the theoretical power of the electorate; that is why the present method is democratic in name only.

Apparently the question of judges being elected every ten years is raised under a misunderstanding of our Plan. The Pennsylvania Plan continues the requirement that a judge must stand on the ballot when his term of office expires, the sole difference being that he runs on a separate, non-political ballot to determine whether he shall or shall not be continued in office. This is the feature that combines the elective method with the appointive method under our Plan.

It is wrong to state that the Missouri Plan is riddled with politics. In June, 1954, James M. Douglas, Chairman of Task Force of Legal Services and Procedure of the Commission on Organization of the Executive Branch of Government, known as the Hoover Commission, had this to say in a letter:

> In my opinion the Missouri Court Plan is continuing to be the most successful plan yet devised for the selection and tenure of judges. It has taken our judges completely out of partisan politics. The judges who were "frozen" in office by the adoption of the plan have become better judges; and the additions to the Bench since the adoption of the plan have never been criticized by the Press or the Bar.
>
> Because of the plan, Judge Roscoe P. Conkling, presently Chief Justice of the Missouri Supreme Court, accepted appointment to the Supreme Court. He was an experienced, able and outstanding lawyer with a most successful practice in St. Joseph, Missouri, which he gave up to take the appointment to the Supreme Court. He would not have done this had it been necessary for him to run for the office in a partisan political campaign. The plan has attracted to the Bench outstanding and successful lawyers.

The *St. Joseph News-Press* contained an editorial feature of October 15, 1953, stating:

> Thanks to an alert press and a militant drive by progressive lawyers aided by the Missouri League of Women Voters and Parent-Teacher units, Missouri today has a nonpartisan judiciary. This judiciary is the envy of bar associations of states from the Atlantic to the Pacific coast.
>
> Missouri is mighty proud of its nonpartisan judicial plan. She will never return to the old political barnstorming campaigns that today still characterize much of political campaigns in Missouri from Northwest Missouri's ancient Platte Purchase area to the Bootheel in Southeast Missouri.

It matters little that the new plan for selecting judges has met resistance in other states. The very activity that Mr. Teller describes in Illinois, Michigan, Nevada, Utah, West Virginia and New Mexico demonstrates the widespread dissatisfaction with the elective system. In the years since 1951, these states have not abandoned their efforts, but have pursued them further.

Temporary setback in judicial reform means nothing. New Jersey's Chief Justice Arthur T. Vanderbilt has observed, in his edition of *Minimum Standards of Judicial Administration*, "Although at times procedural reform in this country may have seemed to progress with the imperceptible speed of a glacier, it may be well to recall that in England the agitation for improving the methods of courts continued well over a century."

Chief Justice Vanderbilt there also remarked, "Judicial reform is no sport for the short-winded, nor for lawyers who are afraid of temporary defeat."

Several people have said to me that the adoption of the Plan needs a scandal in our courts. This idea is comfortless and promotes corruption. We should not have to wait until an institution lies prostrate before aggressive action is undertaken. There is a twilight zone of mediocrity, when inroads are made upon our institutions which tend to destroy them. This is no time to be passive, but demands action to correct an intolerable condition.

Taxation of Life Insurance and Annuities

(Continued from page 132)

tax deduction may be allowed the survivor under a joint and survivor annuity for the estate tax attributable to a portion of the value included in the gross estate under Section 2039 as though a portion of the survivor's otherwise taxable income were income in respect of a decedent.

III. Exchanges of Policies

Under the old law, the rule is simply stated but often quite harsh in its application. Upon an exchange, the excess of the value of the policy received above the cost of the policy surrendered was taxable.

The new Code in Section 1035 establishes a hierarchy of the three principal types of contracts. At the top is a life insurance contract, followed in order by endowment and annuity contracts. No gain or loss is recognized unless the new contract has a higher status than the one surrendered. Specifically, the new Code provides for non-recognition of gain or loss on exchange of an annuity for another annuity; or exchange of an endowment contract for an annuity or for another endowment contract with no later date for the beginning of regular payments: or an exchange of a life insurance contract for another life insurance contract or an endowment or annuity contract.

Naturally it is the converse of the above exemptions which create consternation among the unwary. The excess of the value of the policy received above the cost of the policy surrendered *remains taxable*, as under the old law, in situations where the built-up values would, if the exchange were tax-free, be more likely to escape income tax upon death, namely, if an endowment contract is surrendered for a life insurance contract, or for an endowment contract with a later maturity; or upon surrender of an annuity for either a life insurance or an endowment contract. In determining basis, prior tax-free recoveries are deducted, but the basis of an annuity contract cannot be less than zero, as provided by perhaps the shortest section of the new Code, Section 1021. As a practical matter, the problem is most likely to arise upon surrender of an endowment contract.

The new Code attempts to define endowment, annuity and life insurance contracts. Unfortunately the effort is not spectacularly successful. These provisions are of course being given careful scrutiny in connection with the promulgation of final regulations.

It should be apparent from what has been said that Mr. Fox, in the third problem stated at the beginning of this article, should (non-tax factors being equal) exchange for life insurance the endowment contract with a value less than cost, since if cost were lower than value gain would be recognized; and of the two endowment contacts where value exceeds cost he should exercise the annuity option under the matured contract before the expiration of sixty days after maturity to avoid constructive receipt of income and should exchange the remaining endowment policy tax-free for an annuity.

IV. Deductibility of Premiums

The new Code, like the old, permits no deduction for premiums paid on any life insurance policy covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy. Presumably such case law exceptions to this rule as existed under the old Code will apply under the new. In the second problem stated at the beginning of this article Mr. Johnson's family corporation could not deduct the insurance premiums.

V. Deductibility of Interest in Connection with Insurance

This heading is of interest primarily to high-bracket cognoscenti. Those who like to live dangerously while dying securely will find it more difficult (but still not impossible) to take advantage of the fact that interest paid on indebtedness is deductible unless the deduction is specifically prohibited, while the projected increment in the actuarial computations of an insurance company attributable to interest is either tax free or, depending upon the contract and what is done with it and when, taxable at a lower rate than that applicable to the interest deduction.

Both the old and the new Codes disallow any deduction for interest paid on indebtedness incurred or continued to purchase or carry a single premium life insurance or endowment contract, but this left a loophole for annuity contracts. The new Code extends the denial of the interest deduction to indebtedness incurred or continued to purchase or carry a single premium annuity contract purchased after March 1, 1954.

Under both old and new Codes, a contract is treated as a single premium contract if substantially all the premiums on the contract are paid within a period of four years from the date on which it was purchased. The new Code extends the same treatment to an amount deposited after March 1, 1954, with the insurer for payment of a substantial number of future premiums on the contract.

VI. Estate Tax on Proceeds of Insurance on Life of Decedent

It is the purpose of this article to discuss merely the income tax provisions in the new Code affecting life insurance and annuities. While more than thirty areas in addition to the subject of insurance and annuities are within the purview of the Committee on Federal Income Taxes, it scarcely needs to be stated that estate tax problems are not. The estate tax changes with respect to life insurance in themselves merit a full length article. Omission of any mention of the estate tax changes herein, however, might mislead some; and offend others who, with some reason, consider that the elimination of the premium-payment test for estate tax purposes is more important in estate planning than all the income tax changes combined.

Under both old and new law, life

insurance proceeds are subject to estate tax in full if receivable by the executor of the insured; or, even though receivable by other beneficiaries, if the decedent possessed any incident of ownership, whether exercisable alone or in conjunction with any other person.

If the decedent possessed no incident of ownership and the insurance was receivable by beneficiaries other than the estate, the old law subjected the proceeds to estate tax to the extent the decedent had paid premiums (in proportion to total premiums). Premiums paid by the decedent before January 10, 1941, were ignored if the decedent thereafter had no incident of ownership.

The new Code provides in Section 2042 that the payment of premiums is immaterial. However, great care must be taken in proper planning in this area for a number of reasons including the interjection of the "Reversionary Interest" test.

Under the old Code, a reversionary interest was not an incident of ownership. Under the new Code, a reversionary interest, whether express or by operation of law, is an incident of ownership if the value of the reversion exceeds 5 per cent of the value of the policy immediately before death of the insured. Moreover, the technicalities of transfers in contemplation of death must be borne in mind. There are rumors that the time is not yet ripe to engrave these new estate tax provisions in stone for posterity.

VII. Payments in Connection with Pension and Profit-Sharing Plans

There are various changes in the new Code affecting the taxation of benefits or annuities paid in connection with pension or profit sharing plans or otherwise by reason of employment. For example: Section 72 (d) provides a rule of convenience for annuities paid for partly by an employer and partly by an employee. If the employee's contributions are recoverable in three years or less, he can, in order to eliminate computations, first recover his cost tax free and then report all the balance as taxable income. Detailed discussion of such provisions is not within the objectives of this article.

The principal purpose of this article is rather to outline the basic pattern of the new provisions taxing income from insurance and annuities so that each problem of Mr. Howard, Mr. Johnson and Mr. Fox, and others like them, can be recognized readily and placed in its proper niche.

The Federal Securities Laws

(Continued from page 136)

and to confirm the rule-making power of the Commission with respect to such trading.

We now come to the offering of debt securities. The Commission, in connection with rule changes to provide for more simple prospectuses for use in the public distribution of high-grade so-called institutional type debt securities, has been confronted with Section 305 (c) of the Trust Indenture Act of 1939 which required inclusion in the prospectus of the analysis of particular indenture provisions singled out by Section 305 (a) (2) of the Trust Indenture Act.[6] This requirement seems unnecessary in the light of the Commission's rule-making authority under the Securities Act to deal with disclosure problems and the amendment leaves the matter to such authority.

The amendment does not affect the substantive provisions of the Trust Indenture Act which continue to require that trust indentures contain the statutory provisions for protection of investors, for example, that there be independent indenture trustees with adequate resources and free of conflicting interests, who must report to security holders and take other affirmative action to preserve investors' rights under indentures and to protect their interests in the event of default.

Finally, the amending Act provides for simplified registration procedure for investment companies. Investment companies which engage in continuous offerings of their shares, as a matter of practice, file new registration statements under the Securities Act of 1933 about once each year in order to have registered shares available. Before amendment, Section 6 of the Securities Act provided that securities may be registered by filing a registration statement but did not provide for registering additional securities by amendment. Section 403 of the amending Act amends Section 24 of the Investment Company Act by adding a new subsection (e) which will permit such investment companies periodically to increase the number of shares registered under the Securities Act by amending their existing registration statements rather than by filing new registration statements. Paragraph (3) of this new subsection (e) will require that current information will be made a part of the registration statement and prospectus at appropriate intervals. There will be no departure from either the disclosure standards or the liabilities imposed upon sellers.

Because of continuous offering of securities by investment companies, an amendment to Section 24 of the Investment Company Act provides for mandatory use of prospectuses by dealers over a longer period than would be required under Section 4 (1) of the Securities Act as modified by Section 6 of the amending Act. Under the amending Act a dealer, whether or not participating in the distribution, must use the prospectus as long as the issuer is offering any securities of the same class as the security which is the subject matter of the dealer's transaction.

The above discussion is limited to the new Act and does not treat many proposals made by industry representatives during the course of the formulation of the legislation which were not made a part of it.

However, one provision of the legislation, as sponsored by the Administration and passed by the Senate,

6. Form S-9, adopted July 21, 1954, Securities Act Release No. 3509.

but eliminated by the House of Representatives, should be mentioned. As introduced, the bill would have increased from $300,000 to $500,000 the maximum amount of exemption from registration under the Securities Act which may be provided by rules of the Commission. The House of Representatives deleted this provision and the Senate acquiesced in the change. A principal reason cited for increasing the exemptive amount is the disproportionate expense of registration of small issues as to which witnesses who appeared before the two congressional committees testified, particularly representatives of the independent telephone industry.

In acquiescing in the House position, the Senate conferees, as stated by Senator Bush in moving the Senate's agreement on the Conference Report:

> concluded, however, that the objective of reducing the cost of financing businesses of small and moderate size can be achieved if the Commission should take administrative action under powers it already has under the statutes.[7]

Senator Bush referred favorably to the Commission's adoption of simplified registration forms for issuers offering securities to their employees[8] and for institutional grade debt securities.[9] Senator Bush introduced in the record a portion of a letter of Chairman Wolverton of the House Committee indicating the latter's sympathy with the proposal:

> that the Commission undertake all action appropriate with reducing the costs of registration, revising applicable forms, and specifying types of information to be included in the prospectus and consistent with maintaining the liabilities and remedies contained in the act for the protection of investors.[10]

The Commission in formulating rules to implement the new legislation is now considering the possibility of a short-form registration statement for small issuers and issues.

The basic purpose of the federal securities laws is that the investor shall have an opportunity to know the facts about what he is investing in. These laws do not insure against risk of loss. Insurance against risk of loss can only be provided by the fundamental soundness of the enterprise in which the investment is made. Under the American system the investor is allowed to choose, without interference by the national government, where he shall invest. This is one of the great virtues of the free enterprise system in this country.

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7. Congressional Record, July 28, 1954, page 11886.
8. Form S-8, Securities Act Release No. 3480.
9. Form S-9, Securities Act Release No. 3509.
10. Congressional Record, July 28, 1954, page 11886.

Standards for Bar Examiners

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an intimate familiarity with the problems of admission to the Bar, but it is not fair to require him to give up a substantial amount of his time for a very long period in the service of the bar admission system. It is not fair also, nor is it desirable, in most cases to continue year after year the same points of view with respect to the admissions system.

In most states the bar examiners serve without compensation, but receive their necessary expenses. Most states cannot afford to pay the examiners for the amount of time which they devote to their service on the committee; but in those states where the bar examiners are paid, obviously such compensation should not be based upon the number of applicants for admission. This latter practice can only have the tendency to encourage a large number of applicants to apply, and if the larger the number who pass means the higher the fee to bar examiners, the quality of the applicants cannot fail to be lowered.

A Vital Need . . . *An Adequate Staff*

I cannot emphasize too strongly the vital need to have an adequate staff to handle the problem of bar examinations. The preparation of questions, the taking of the examination, the grading of answers, and the preparation of statistics all demand persons who can devote their full time to the task. These individuals should devote their full time to the task because it is indeed a full time job.

The next proposals deal with standards for the bar examination itself. Everyone must agree that the purpose of a bar examination is to assure the public and the Bar that only those persons who are properly qualified to practice should be admitted to the legal profession. Inasmuch as the bar examination is administered by lawyers appointed by a bar association or by a higher court, the examination should demonstrate clearly that this purpose is carried out fairly and impartially and that the Bar is not, through this mechanism, taking steps to limit its members to a tight little union in which ability is subordinated to lower numbers.

The examination itself, to achieve the best results, should test the applicant's ability to reason logically, to make an accurate analysis of the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of the

law and their application. Above all, the questions should *not* be designed primarily for the purpose of testing information, memory or experience. In a number of states the bar examiners continue to ask definition and information questions. As a test of legal reasoning and analysis, such questions are of no value. As Professor Brenner has put it,

> The definition and information type question should go the way of the horse and buggy and the emphasis should be kept on the type of question that will provide the best possible evaluation of the applicant's law school training.[3]

Bar examiners should use essay type questions as best adapted to test the reasoning and analytical powers of the applicants. The questions should not be labelled as to subject matter, and a generous allowance of time should be given to answer each question. All answers to the same question should be graded by the same reader. There should be adequate statistical studies and the law school records should be made available to the public. The National Conference of Bar Examiners is offering, as a part of its service, to give complete statistical service on the subject of bar examinations for any state committee which desires it. I recommend highly that each committee which cannot afford its own statistical service take advantage of the National Conference's offer.

A second matter which I want to emphasize is that statistics of bar examination results should be published. These statistics certainly give the public the information it needs as to how well the graduates of a particular law school do in the bar examination. If they are not published, the public has no way of knowing whether the law school is or is not doing a good job. Every law school should be willing to have these results published.

In time, a national standard bar examination should become available.

What subjects should be covered by questions in the bar examination? In my view, emphasis should be upon basic and fundamental common law subjects. By the giving of optional questions, fields of law actively developing and of great current importance, such as taxation, trade regulations, administrative law, labor law and the like, could be presented. The scope of the examination should cover subjects which are commonly taught in the approved law schools. In the Brenner Report, Professor George Neff Stevens surveyed the subjects covered by the bar examinations in all of the states. From his survey it appears that the bar examinations in each state give questions in the following subjects: contracts, criminal law and real property. In all but four states the bar examinations cover the following additional subjects: agency, constitutional law, corporations, equity, evidence, negotiable instruments, pleading and torts.[4]

Professor Brenner has suggested with much force that in each bar examination there should be questions on about ten "must" subjects. These include contracts, torts, real property, criminal law, evidence, equity, taxation, corporations, trusts and constitutional law. In addition to this, no set of questions should be compulsory so as to require the answering of all of the questions given at each session of the bar examination. In many cases a law school instructor has favorite parts of his subject, and covers these thoroughly. Others he may not cover at all or cover inadequately. To meet this difficulty, it is believed that optional questions should be offered in each of the bar examination sessions. Where optional questions are given, they should not relate to the same part of the subject as other questions on the same subject in the examination. Thus, if a student has had a thorough grounding in a particular section of his case book, but a rather light touch in another, the chances are that if optional questions are given covering different parts of a subject he will at least have a chance to demonstrate his ability in that part of the subject in which he has had a thorough instruction.

In the use of optional questions also Mr. Brenner has suggested that many subjects might be covered on an optional basis which are not included in his "must" list. This would obviate the argument that bar examination procedures straitjacket the curricula in the law schools. This would also give the applicant the chance, if he was unfamiliar with a particular subject, but was familiar with some of the other optional subjects, to write answers on such a subject. Thus he would not be caught in a position where because of his lack of instruction he has little to offer.

In the giving of questions, fairness demands that bar examiners not restrict questions to particular local cases or local laws. There are some states, for example, where the law of community property is important. There would be no reason why questions in community property should not be given, but it is submitted that such questions should be given on an optional basis. The principal reason for this is to permit the students who attend the national law schools to go back to their home states and be free from disadvantages in the answering of bar examination questions which might be based on local law. So long as the national law schools are offering first-grade legal instruction, the students who go to such schools should not be discriminated against in favor of the local talent. This is not to suggest, however, that they should never brush up on subjects which might have a local application.

The purpose of the examination questions should not be one to test memory or for that matter to call for a freak type of answer. The questions which call for "yes" and "no" answers are in the main the type of questions that call for the exercise of memory rather than analysis. Persons who never studied law would have at least a 50 per cent chance in answering these.

Because of the inherent difficulty

3. Brenner Report, page 23.
4. Brenner Report, page 343 *ff.*

in examining each applicant by an oral examination, it is imperative, on the ground of fairness, that the major portion of the bar examination be given in writing. Unless this is done, the examination is more likely than not to be inadequate.

These mimimum standards for bar examiners and bar examinations, I believe, would go very far in eliminating many of the grounds of complaint which the public makes against the legal profession. If the American Bar Association endorses them, such endorsement would have a powerful appeal to public opinion. While a number of the standards call for the revision of court rules or statutes, there are many which can be adopted by the bar examiners themselves. Doubtless, bar examiners can explain that they themselves do not make all the rules, yet I submit, they exercise a far from inconsiderable influence on the subject. Many of their difficulties would be obviated by an adequate staff. The task is so important that it justifies the expenditure of the necessary money.

The minimum standards suggested in this paper would go a long way to implement the Brenner Report. We cannot fail in our duty to the public to eliminate an important source of dissatisfaction with the administration of justice. We must stand resolutely at the very gates, to allow only the competent, the honest, and the loyal to enter the profession. There is no other way.

I might in closing repeat the story told by Dr. Walter C. Alvarez, formerly of the Mayo Clinic:

> A big merry farmer once consulted me about spells of severe nausea. Unable to find anything wrong in his stomach or bowel, I asked his wife what she thought the cause was.
>
> She said, with much disgust, "I don't know why he is wasting our money going to doctors; he knows perfectly well that his nausea comes whenever he goes on a binge of chewing tobacco and swallowing the juice."
>
> Turning to the man, I asked, "Is she right?" And grinning sheepishly, he said, "I guess so, but I so hoped it would be something else so that I could go on chewing!"

Antitrust Developments

(Continued from page 116)

was anything but minuscule.[34] Inquiry into actual or probable adverse competitive effects flowing from the price discrimination was not permitted. This seemed grotesque to those who believed that if you forbid price differences you cut off the right arm of competition or perhaps even kill it entirely.[35] It also seemed to fly in the face of the statute itself.

Both in Section 2 of the Clayton Act as originally enacted in 1914[36] and in the 1936 Robinson-Patman amendment to that section, differences in price were proscribed where the effect ". . . may be substantially to lessen competition or tend to create a monopoly".[37] In addition, the amendment barred price discrimination where the effect may be "to injure, destroy or prevent competition

34. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). "As matters stand today, any price difference which accountants cannot equate to a cost difference becomes a discrimination; and any discrimination is *per se* illegal if in the view of the Commission it may have a tendency to injure 'competition.'" Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1336 (1948). "[I]t is almost accurate to say that, if the Commission desires, so far as injury to competition is concerned, all that need be found is injury; that to show injury all that is needed is to show a type of discrimination, and that to show this type of discrimination all that is required is to show substantial price differences in sales of like goods to competing customers by a single seller." Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ANTITRUST LAW SECTION REPORT 60, 67-8 (A.B.A. 1952).

35. ". . . the Robinson-Patman Act promotes that uniformity of prices and control over prices which the Sherman Act and also the Federal Trade Commission Act deem to be illegal." Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ANTITRUST LAW SECTION REPORT 60, 61 (A.B.A. 1952); ". . . undercutting rivals is the heart of competition." Berger and Goldstein, *Meeting Competition under the Robinson-Patman Act*, 44 ILL. L. REV. 315 (1949).

36. 38 Stat. 730.

37. Similar language is found in Section 3 and Section 7 of the Clayton Act (15 U.S. C. §§14, 18). This language was construed to call for the application of a rule of reason. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463 (1923); *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930). The diverse judicial treatment, as between Sections 2, 3, and 7 of the Clayton Act, of the common qualifying clause "where the effect . . . may be to substantially lessen competition . . ." has been recently noted. McAllister, *op. cit. supra* note 25.

with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The "rule of reason" is equally implicit in both the original and in the amendatory language. Certainly the quoted words negative any intention on the part of Congress to make *every* price discrimination illegal whether or not it injures competition or is likely to do so.

Moreover, the Robinson-Patman Act retained certain provisos, in somewhat modified language, from the earlier enactment under which otherwise illegal price discriminations may be defended. Accordingly, if the discrimination is justified as reflecting cost savings in selling to one customer as compared with another, or if the lower price is made in good faith to meet the equally low price of a competitor, the discrimination is not unlawful. The Act, over-all, seemed to require that a factual determination be made to determine, first, whether a particular price discrimination had or was likely to have a substantially adverse effect on competition,[38] and if so, second, whether such discrimination was cost justified or otherwise defensible as meeting competition in good faith.

Nevertheless the Federal Trade Commission has in the past come close to outlawing *all* price differences. This came about primarily because the Commission usually did not determine whether a price discrimination actually injured competition or was likely to do so. The injury was presumed or inferred from the mere difference in price.[39] In this the Commission found support in the Supreme Court. Thus in *Corn Products* there is the dictum that the Commission need only show " . . . that there is a reasonable possibility"[40] of injury, and it was made clear that any significant price difference automatically establishes that possibility. And in *Morton Salt*[41] a carload discount amounting to 10 cents a case on a $1.60 item (and which was availed of by all but one tenth of one per cent of the Salt Company's customers) was deemed sufficient to prove the required statutory injury. No testimony whatsoever concerning injury to competition was required. In fact the Commission was criticized for taking testimony on this issue.[42]

Thus the *per se* doctrine flourished in price discrimination cases. The price discrimination law, blindly applied to ban all price differentials irrespective of adverse competitive effect, was made to order for those industries where "sticky" prices prevail, where a seller who reduces his price may "spoil the market" for all and hence is deemed a "chiseler". So interpreted, the Robinson-Patman Act would have, in time, eradicated the sporadic and competitively advantageous discrimination which has been characterized as "one of the most powerful forces of competition" which tends to tear apart an "orderly" price structure.[43] The application of illegality *per se* to price discrimination problems thus was at war with the basic purpose of the antitrust laws, the preservation of free and open *competition*.

The Recent Trend . . . *Away from Morton Salt*

But a reverse trend is in the making —the Robinson-Patman Act may yet be finally construed in a manner not inconsistent with the Sherman Act. In the *Minneapolis-Honeywell* case,[44] where the thermostat control which sold at differing prices was a component part of oil burners and where there was little, if any, correlation between the price of the control and the price of the completed burner, the Court of Appeals rejected the Commission's conclusion that statutory competitive injury was inevitably present merely because of the price differential.[45] In the *Spark Plug* cases[46] the Commission found no injury to competition among competing spark plug manufacturers arising from the fact that Champion, AC, and Electric Auto-Lite sold spark plugs to automobile manufacturers as original equipment at a much lower price than that charged for their replacement plugs. Finding no "*undue* mortality rate"[47] among competitors of the respondent manufacturers and no "*undue* loss of business"[48] of such competitors attributable to respondents' original equipment prices, the Commission dismissed the complaints as to this phase of the cases. These are obviously "rule of reason" criteria.

The recent *General Foods* case[49] evidences an explicit rejection of the *per se* rationale of the *Morton Salt* case, at least as far as territorial price

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38. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952); see also Oppenheim, *Should the Robinson-Patman Act Be Amended?* CCH ROBINSON-PATMAN SYMPOSIUM 141 (1948); Sunderland, *The Robinson-Patman Act: Go Out and Compete But Don't Get Caught At It*, speech delivered before National Conference American Marketing Assn., December 28, 1952; see also *Effective Competition*, Report to Secretary of Commerce Sawyer by his Business Advisory Council, page 5 (December, 1952).

39. There has been confusion in the cases with respect to whether the inference is one of "probable" injury or merely of "possible" injury. Compare *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 739 (1945) ("probable"); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46 (1948) ("possibility"); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305 (1949) (treating analogous Section 3, Clayton Act, language—"probably"). This confusion is now unimportant because the Commission has held that *any* price difference meets the test, be it "probability" or "possibility" of injury. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786, 792 (7th Cir. 1951), *cert. granted*, 342 U.S. 940 (1952), *cert. dismissed* on procedural grounds, 344 U.S. 206 (1952).

40. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 742 (1945).

41. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948).

42. *Id.* at 50.

43. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1331-2 (1948). See also Rowe, *Price Discrimination*, 60 YALE L. J. 929, 938-9 (1951).

44. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786 (7th Cir. 1951); *cert. granted*, 342 U.S. 940 (1952), and dismissed on procedural grounds, 344 U.S. 206 (1952). Mr. Justice Black refused to concur in this result, saying, "The end result of what the Court does today is to leave standing a Court of Appeals decree which I think is so clearly wrong that it could well be reversed without argument." 344 U.S. at 213.

45. "[W]here the controls were used in the manufacture of burners, the cost of which was determined by many other factors—cost of other materials and parts, service, advertising, to mention only a few—it cannot be said that discriminatory price differentals substantially injure competition or that there is any reasonable probability or even possibility that they will do so." *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, *supra* note 44, 191 F. 2d at 792 (7th Cir. 1951).

46. Spark Plug decisions, F.T.C. Dockets 3977, 5620, 5624, CCH Trade Reg. Rep., Par. 11,467 (1953).

47. *Matter of General Motors Corp. and AC Spark Plug Co.*, F.T.C. Docket 5620, Findings (Italics added).

48. *Matter of Champion Spark Plug Co.*, F.T.C. Docket 3977, Findings (Italics added).

49. *General Foods Corp.*, F.T.C Docket 5675, CCH Trade Reg Rep., Par. 25,069 (1954).

discrimination is concerned. General Foods was charged with discriminating in the price of liquid and powdered pectins (products used by housewives in making jellies and jams) on the West Coast between the years 1940 and 1947. The company had certain "deals" in effect under which the ultimate consumers could purchase a third bottle of pectin at a reduced price whenever two were purchased at the regular price. The "deals" were made available only in the western territory where there was competition from other pectin manufacturers. Since the favorable prices were available to all customers in the western area, there was no discrimination between competing customers, and the only injury to competition claimed by the F.T.C. was on the "primary" level—with General Foods' own West Coast competitors.

General Foods' national market position in pectins gradually rose from 67 per cent in 1940 to 80.5 per cent in 1946, and dropped to 64.6 per cent in 1947. The sales of the principal West Coast competitor, who allegedly was injured by the "deals", approximately trebled during the same period. Another principal competitor's sales increased 15 per cent during the period. In upholding the Hearing Examiner's dismissal of the case on the theory that there was no showing of injury to competition, the Commission explicitly found the *Morton Salt* test inappropriate. Instead, it was held that the existence of injury must be determined by a consideration of all of the relevant evidence in the particular case, although the inferences which could be drawn therefrom might differ in each case. Moreover, on the crucial question as to which party has the burden of proving injury to competition, the Commission flatly refused to follow the *Moss*[50] decision, which had indicated that when a price differential was shown the burden shifted to the discriminating party to prove that there was no injury to competition.

Now, the Commission frankly places this burden on its own counsel, on the ground that actual evidence of competitive injury is one of the elements necessary to establish a prima facie case.

Shortly after the *General Foods* decision, an F.T.C. hearing examiner dismissed the complaint in a similar territorial price discrimination case involving Purex Corporation.[51] Going further than the *General Foods* case in explaining exactly what constituted injury to competition, the examiner pointed out that the Robinson-Patman Act was not primarily intended to protect individual competitors, but rather to protect the competitive process itself. He stated, "The fact that a competitor has been injured in a local price-cutting case may tend to show that competition with the grantor has been affected, but it does not follow in every case that because a competitor has been injured, competition has been affected." The distinction between "injury to a competitor" and "injury to competition" is pointed out in Simon, *Geographic Pricing Practices* (1950) at page 94.

The recent *Transamerica* case,[52] involving Section 7 of the Clayton Act before its recent amendment, is in the same vein and displays a "rule of reason" approach to the proof of adverse competitive effect described by the words "to substantially lessen competition". At issue was the legality of a series of bank mergers through which Transamerica, owned by A. P. Giannini and associates, acquired the stock of numerous commercial banks and branches in five states. Various acquired banks were merged into the Bank of America and other chains. Refusing to be stampeded into a presumption of illegality from the mere number of mergers, the court found untenable the conclusions of the Board of Governors of the Federal Reserve System that the acquisitions tended toward monopoly in the five states concerned in the absence of the necessary supporting finding that the five states constituted a single area of effective competition. In the view of the court " . . . the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked."[53]

Probably in the same vein is the F.T.C. opinion in *Pillsbury Mills*[54] in which the Commission, for the first time, analyzed acquisitions under Section 7 of the Clayton Act after its amendment in 1950.[55] The hearing examiner had ruled that a prima facie case had not been made out because the charge of unlawful acquisitions was not supported, in his opinion, "by reliable, probative

50. *Moss, Incorporated* v. *Federal Trade Commission*, 148 F. 2d 378 (2d Cir. 1945).

51. *Purex Corp., Ltd.*, F.T.C. Docket 6008, CCH Trade Reg. Rep., Par. 11,704 (1953). The order automatically became final when counsel supporting the complaint withdrew their appeal, CCH Trade Reg Rep., Par. 25,172 (1954).

52. *Transamerica Corp.* v. *Board of Governors of Federal Reserve System*, 206 F. 2d 163 (3d Cir. 1953), cert. denied, 346 U.S. 901 (1953).

53. 206 F. 2d at 170.

54. *Pillsbury Mills, Inc.*, F.T.C. Docket 6000, CCH Trade Reg. Rep. Par. 11,582 (1953). The only other proceedings involving Section 7, as amended in 1950, are *Crown Zellerbach Corp. of San Francisco*, F.T.C. Docket 6180, CCH Trade Reg. Rep., Par. 11,640 (1954), and *Luria Brothers & Co., Inc.*, F.T.C. Docket 6156, CCH Trade Reg. Rep., Par. 25,129 (1954).

55. 64 Stat. 1125, 15 U.S.C. §18. Before amendment Section 7 prohibited corporate acquisitions of stock having any of the following effects: (1) substantial lessening of competition between the merging companies, (2) restraint of commerce in any section or community, or (3) a tendency to create a monopoly. As amended Section 7 prohibits the acquisition of assets as well as stock "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Clearly the first two of the three tests under old Section 7, that as to competition between the acquiring and the acquired companies and that as to a restraint of commerce in any section or community, have been eliminated by the amendment. See *Pillsbury Mills, Inc.*, *supra* note 54.

and substantial evidence". In reversing, the Commission held that the evidence submitted—principally with respect to (1) Pillsbury's growth through mergers and otherwise, (2) its increased production capacity and enhanced market position, (3) the picture of an industry declining, nation-wide, in number of competitors and in productive capacity, and (4) the competitive picture in the southeast states, where the acquisitions in question had their principal impact—was sufficient to establish a prima facie case. The Commission made it clear that the respondent would have an opportunity to "explain, contradict or rebut" the evidence mentioned.

Chairman Howrey, for a unanimous commission,[56] rejected the Commission attorneys' argument that the "substantiality" test, applied in the *Standard of California* case, made it unnecessary to examine economic consequences or determine the probable competitive effects of the acquisitions; under his view " . . . it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected."[57] As in *Maico*,[58] the commission referred to its basic function as a specialist and expert in the antitrust complexities of American trade and industry and indicated that it would be abdicating its duties if it did not face up to the issue of competitive injury, saying, "If the administrative tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines, the rationale for its creation disappears."[59]

Secondly, Chairman Howrey differentiated between the Sherman Act "rule of reason" in merger cases[60] and that to be applied under Section 7 of the Clayton Act. The latter section was said to be designed to reach some mergers which would be beyond the scope of the Sherman Act. He said, "Somewhere in between [Sherman Act 'rule of reason' and *per se* violations] is Section 7, which prohibits acts that 'may' happen in a particular market, that looks to 'a reasonable probability,' to 'substantial' economic consequences, to acts that 'tend' to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraints."[61]

Recognizing that this opinion may not be the final Commission word in *Pillsbury Mills*, since the respondent may attempt to rebut the prima facie case, the deep bow to a "rule of reason" displayed by the Commission in the present opinion is refreshing, so far as it goes. But, until such time as the Commission, in this case or another, clarifies the manner in which a respondent may rebut a prima facie case built upon proof of an acquisition in an industry where the number of competitors has declined and where the acquiring company necessarily increases its share of the market by virtue of the acquisition, the practical and legal implications of the present *Pillsbury* decision are uncertain.[62]

A Basic Defense . . . *Cost Justification*

A basic defense to a price discrimination charge under the Robinson-Patman Act is cost justification. A seller is permitted to pass on to a customer cost savings reflecting "differences in the cost of manufacture, sale, or delivery" as between serving that customer and his competitor.[63] The very presence of the cost savings defense in the statute would seem to reflect a congressional intention to protect and encourage efficiencies in manufacture, sale, and delivery and to permit a seller to pass on to any customer applicable cost savings realized in serving that customer.

As has been widely recognized,[64] the Commission's treatment of respondent's attempts to cost justify discriminatory prices has been something less than sympathetic. In *Automatic Canteen*, however, the Supreme Court noted "the elusiveness of cost data, which apparently cannot be obtained from ordinary business records. . . ." Further, " 'general knowledge of the trade,' to use the Commission's phrase, unsupported by factual analysis has as yet been far from acceptable, and indeed has been strongly reproved by Commission accountants. . . ."[65] Partly as the result of the Commission's past critical treatment of cost studies and because the making and reviewing of a cost study are exceedingly time consuming and expensive at best, the cost defense has been little used in the past.[66] This has had the effect of eliminating for practical purposes

56. Commissioner Mead concurred in the result.

57. *Supra* note 54.

58. *The Maico Company, Inc.*, *supra* note 26.

59. *Supra* note 54. See also dissenting opinion of Mr. Justice Jackson in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 487-9 (1952).

60. *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948).

61. *Supra* note 54.

62. We are not told what type of evidence, if any, would satisfactorily "explain" the situation to the F.T.C.

The Department of Justice's views on Section 7, as amended, were recently set forth by Attorney General Brownell, in a public announcement of the Department's refusal to grant antitrust clearance to the proposed merger of Bethlehem Steel Corporation with Youngstown Sheet and Tube Company. *The Antitrust Aspects of Mergers*, an address by Hon. Herbert Brownell, Jr., before The New York Chapter of the Public Relations Society of America, September 30, 1954. *New York Times*, October 1, 1954, page 10. The significant aspect of his address was the listing of various specific factors which must be scrutinized in determining the legality of any particular merger, and the clear-cut indication that each case must be decided in the light of all the surrounding facts and circumstances—the orthodox "rule of reason" approach.

63. Section 2(a) states in part: "*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 49 Stat. 1526 (1936), 15 U.S.C. §13 (1946).

64. Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials under the Robinson-Patman Act*, 30 Tex. L. Rev. 1 (1951); Haslett, *Price Discriminations and their Justifications under the Robinson-Patman Act of 1936*; 46 Mich. L. Rev. 450 (1948); Note, 65 Harv. L. Rev. 1011 (1952). See also collection of authorities cited in footnotes. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 68, 69 (1953).

65. 346 U.S. 61, 68-69. The Court also said at 68: "It is sufficient to note that, whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business."

66. The handful of cases in which cost justification has succeeded include: *Bissell Carpet Sweeper Co.*, 40 F.T.C. 738 (1945); *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948) (in part only); *United States Rubber Co.* (footwear), 46 F.T.C. 998 (1950) (in part only); *Horlicks Corp.*, 47 F.T.C. 169 (1950).

one important avenue to competition.

There may, however, be much more reliance upon cost justification in the future. Chairman Howrey has recently expressed an awareness of the need to make of cost justification a workable defense.[67] The formulation of guiding yardsticks in the field of distribution cost accounting is the future goal for which a committee, appointed by Mr. Howrey, is to determine whether standards of proof and procedures for costing can be adopted by the Commission.[68] The official recognition of the need for costing standards is but one ray of hope in this area.

Perhaps more concrete Commission action is reflected in the initial decision in the *B. F. Goodrich* case,[69] wherein the respondent utilized the cost savings defense when charged with price discrimination in relation to the sale of rubber and canvas footwear. The Goodrich Company had some ten quantity discount brackets and, according to the initial decision, it had been stipulated that all price differences were cost justified with the exception of one bracket. Inasmuch as the sales by respondent in this bracket amounted to less than one-half of one per cent of the total sales of the item in question, the hearing examiner determined (Commission counsel not objecting) that it would not be in the public interest to pursue "an inquiry relating to a discount bracket affecting such an insignificant proportion of respondent's business from which no possible substantial injury to competitors could result."[70]

The recent Commission action in the *Sylvania* case[71] also gives promise of a more realistic attitude toward the cost justification defense. The case involved price differentials on approximately 600 types of radio receiving tubes, it being charged that Sylvania favored a private-brand purchaser (Philco) over its own distributors. The hearing examiner found some cost justification for the differential, but the real issue concerned the prices to which the cost justification was applicable. Taking a literal, but unrealistic interpretation of the Robinson-Patman Act's language, he refused to allow Sylvania to use weighted averages in ascertaining the prices, concluding that the price for each type of tube was that shown on the price lists. The result was that price differentials with respect to each of the hundreds of tube types would have to be separately cost justified. On appeal this highly technical approach was reversed by the Commission, which held that the use of weighted averages was appropriate, where there was no showing that the lack of uniformity in the price spread on the various types of tubes had any competitive significance. The volume and demand were determined neither by price nor by customer choice, but simply by the size and kind of radios owned by customers needing new tubes.

It appears that we may be on the way towards achieving the practical utility of cost savings originally contemplated by Congress.

Another Defense . . . *Meeting Competition*

The second important proviso in the Robinson-Patman Act makes lawful a lower price made in good faith to meet the equally low price of a competitor.[72] The leading case on meeting competition, the *Standard Oil* "Detroit" case,[73] reflects the tug-of-war between basic Sherman Act doctrines and a sterile, anti-competitive reading of the Robinson-Patman Act which, for practical purposes, would have construed the meeting-competition defense out of the statute altogether. Because the Supreme Court decision in this case recognized the danger to Sherman Act precepts inherent in this construction and specifically refused to interpret the Patman Act in a manner antagonistic to the Sherman Act, the indication of

67. "Price Differentials Based on Cost Differences," address of Edward F. Howrey, Chairman, Federal Trade Commission, before Boston Conference on Distribution, October 18, 1954. NEW YORK TIMES, October 19, 1954, page 37.

68. "Revaluation of Commission's Responsibilities", page 5, address of Edward F. Howrey, Chairman, Federal Trade Commission, before 1953 Institute Federal Antitrust Laws, University of Michigan, June 18, 1953. Professor H. F. Taggart of the University of Michigan has been appointed chairman of this committee.

69. *The B. F. Goodrich Co.*, F.T.C. Docket 5677, CCH Trade Reg. Rep., Par. 11,583 (1953).

70. *Id.*

71. *Sylvania Electric Products, Inc.*, F.T.C. Docket 5728, CCH Trade Reg. Rep., Par. 25,181 (1954). The rejection of a mechanical application of the Act and the recognition of the realities of the market place are particularly apparent in Chairman Howrey's concurring opinion. CCH Trade Reg. Rep., Par. 25,197 (1954).

72. Section 2(b) proviso: "*Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 49 Stat. 1526 (1936), 15 U.S.C. §13 (1940).

73. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

things to come is perhaps clearer here than elsewhere.

In relation to the meeting-competition proviso, the basic facts in the *Standard Oil* case were that Standard sold gasoline to four jobber customers at 1½ cents a gallon below the price at which it sold to retail dealer customers, that Standard introduced evidence of offers from competing oil companies to the four jobbers showing that each could have bought comparable gasoline from such suppliers at the same or lower prices, and that Standard would have lost each of the four jobbers had it refused to sell at the lower price. The Commission did not question any of these facts. Instead, it ruled initially that the meeting-competition defense was not available to Standard because, it said, the price discrimination injured competition.[74] Commissioner Lowell Mason, anticipating the current trend by some years, dissented.[75]

The majority ruling in this case must be viewed in relation to the F.T.C. action in *Minneapolis-Honeywell*. In that case the Commission construed the company's statement that it was "meeting competition" to be in and of itself an admission of injury to competition. The mere assertion that a customer was retained by meeting a lower price offered by a competitor was said to show that "competition has been adversely affected within the meaning of the law".[76]

According to the then Commission majority, every price discrimination injured competition, and since in *Standard Oil* the Commission initially held that the meeting-competition proviso had no force or effect where the price discrimination injured competition, the Commission logic would have effectively eliminated the meeting-competition defense from the statute. This logic was of the same breed as that which generated the ruling that any price discrimination was illegal *per se*.

The Supreme Court's reversal of the Commission in the "Detroit" case was in part grounded upon judicial recognition that under the Commission's theory the right to meet competition "would have such little, if any, applicability as to be practically meaningless".[77] The Court believed " . . . that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitors".[78] With a side glance to the difficulty in reconciling the economic theory underlying the Robinson-Patman Act with that of the Sherman and Clayton Acts, the Court said " . . . Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self defense against a price raid by a competitor."[79]

This Supreme Court's holding, that a showing of meeting competition in good faith constitutes a complete defense irrespective of any claim of competitive injury, represents the considered adoption of a construction of the Patman law altogether consistent with basic anti-trust philosophy. The majority opinion in *Standard Oil* and the "rule of reason" in other areas stem from the same source.[80]

More recently the present majority of the Commission expressed its views on the meeting-competition defense in a letter to the Senate Judiciary Committee, stating in part: "Our free enterprise system requires competition in all areas. In fact our whole theory of trade regulation is based upon the existence of competition in every market. If such regulation is to remain effective, a seller must be permitted, when acting fairly and in good faith, to meet the equally low price of a competitor."[81]

Thus publicly and officially the majority of the present Commission has disavowed the position previously taken in the *Standard Oil* case by the former Commission majority. The need for preserving the right to meet competition in the interest of protecting the competitive system has been recognized by the Department of Justice all along.[82] There is reason to expect that, in the future, substance will be given to the meeting-competition defense.[83]

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74. 41 F.T.C. 263, 281, *et seq.* (1945), modified order, 43 F.T.C. 56 (1946).

75. 43 F.T.C. 56, 59 (1946).

76. *Minneapolis-Honeywell Regulator Co.*, *op. cit. supra* note 44, 44 F.T.C. 351, 397 (1948). Commissioner Mason dissented.

77. *Supra* note 73, at 250.

78. *Ibid.*

79. *Id.* at 249. An economist has put it this way: "We want all firms to be free to reduce their margins to meet or undercut a competitor's price, if their interests as competitors rather than as would-be monopolists so dictate. Price discrimination may be the only possible form of effective price rivalry in imperfect markets." Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 47 (1953).

80. Additional light on the scope and applicability of the meeting-competition defense may be forthcoming soon from this same case. The Commission in a three-to-two decision on remand has ruled, on the basis of legal conclusions, that Standard was not in good faith. Commissioners Mason and Carretta dissented. Of the present Commission members only Commissioner Mead voted with the majority on this decision; Chairman Howrey and Commissioner Gwynne had not become members. The then majority admitted that Standard may have been convinced, and for "substantial reasons", that if it stopped selling to its four jobber customers at the lower price it would have lost those accounts. Docket 4389, Par. 14, Modified Findings, January 16, 1953. After making findings that Standard was not in "good faith", the Commission "recertified" the case to the Court of Appeals for the Seventh Circuit for review. A preliminary question was raised as to the jurisdiction of the court, but the court ruled it would review the Commission's new findings and consider the Commission's revised order as a suggested modification of the original 1956 order. In January, 1954, however, the court, on the motion of Standard and various interested jobber groups, decided that it had no jurisdiction under this "recertification" procedure, and therefore remanded the case to the F.T.C. without deciding the question whether the Commission's new findings were supported by the evidence, or whether either the original or revised order is presently in effect. CCH Trade Reg. Rep., Par. 67,727 (7th Cir. 1954). Standard has now filed a petition with the F.T.C. for a rehearing of the case and, as of November, 1954, that petition was still pending.

81. Letter of Chairman Howrey to Chairman, Senate Judiciary Committee, June 16, 1953, CCH Trade Reg. Rep. Letter 270, July 3, 1953.

82. See testimony of Assistant Attorney General H. A. Bergson before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, June 8 and 14, 1949, page 12 (U.S. Govt. Printing Office 1949); report of Department to Senate Interstate and Foreign Commerce Committee concerning S. 236 of February 25, 1949, in hearings before Subcommittee of Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess., January 24, 25, 26 and February 18, 1949, page 320 (U.S. Govt. Printing Office 1949).

83. See *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 800-802 (S.D. Cal. 1952).

It must be recognized that neither the *Standard Oil* case, 340 U.S. 231 (1951), nor the Commission statement of policy purports to resolve all problems of interpretation. For example, there is a suggestion in *Standard Oil* that the competitor's price being met must be "lawful", 340 U.S. 231, 238, 242, 244, 246, which probably originated in *Federal Trade Commission v. Staley Mfg. Co.*, 324 U.S. 746 (1945). Requiring a seller to prove lawfulness of his competitor's price might well constitute an insurmountable hurdle to the efficacy of the defense. The indication is, however, that as to this problem the majority of the present Commission does not require the seller to prove lawfulness, merely requiring such seller to show that it had no reason to believe the competing price to be unlawful. *E. Edelmann & Co.*, F.T.C. Docket 5770, CCH Trade Reg. Rep., Par. 11,673 (1954); *C. E. Niehoff & Co.*, F.T.C. Docket 5768, CCH Trade Reg. Rep., Par. 25,134 (1954). This fits the concept expressed in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953), at 69—the Robinson-Patman Act must be interpreted so as not to require conduct of respondents having dangerous Sherman Act consequences. Such interpretation is also indicated by the Commission majority approval of the Capehart Bill, S. 1377, 83d Cong., 1st Sess.

Of equal importance with *Standard Oil* "Detroit" case is the recent *Automatic Canteen* decision,[84] both for its immediate holding and for its broader implications. In that case the Commission's target was a buyer allegedly guilty of violating Section 2 (f) of the Act which makes it unlawful ". . . knowingly to induce or receive a discrimination in price which is prohibited by this Section."[85] The F.T.C. maintained that a buyer is guilty of violating this section if the Commission proves nothing more than that "the buyer knows only that the prices [at which it buys] are lower than those offered to other buyers."[86]

Concluding that the Commission's argument would make the buyer act at its peril whenever it engaged in price bargaining, the Court said ". . . a buyer is not liable under §2 (f) if the lower prices he induces are either within one of the seller's defenses, such as the cost justification, or not known by him not to be within one of those defenses."[87] Additionally the Court ruled that the burden of proof was on the Commission staff to show that the lower price was not cost justified and whether the buyer had reason to believe that the lower price was not cost justified.

It appears that a specific policy determination was at the heart of the Supreme Court's decision. Referring to the Commission's proposition that a buyer, before he accepts a lower price from a seller, should make certain that the lower price could be cost justified, the Court said: " . . . we think the fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case."[88]

As in *Standard Oil*, so in *Automatic Canteen*—where two interpretations of the "infelicitous language"[89] of the Robinson-Patman Act were possible, the Court deliberately selected that which would encourage price competition and which was consistent with Sherman Act philosophy.[90]

It is paradoxical that on the one hand the "rule of reason" was read into the Sherman Act, which in so many words condemns *every* contract in restraint of trade, while on the other hand so much effort has been asserted to nullify the "rule of reason" language expressly written into the Clayton Act and into its Robinson-Patman amendment. Clearly *all* exclusive dealing contracts, mergers and price discriminations are not unreasonable restraints of trade. An identical competitive practice of two traders may, in one instance, foster sound competition and, in the other, defeat it, depending upon the accompanying circumstances. Judicial and legislative recognition of this principle resulted in the conception of the "rule of reason" in relation to the Sherman Act and of the various qualifying phrases written into the Clayton Act and the Robinson-Patman amendment. Only by judging the legality of a particular practice or price in the light of all pertinent facts can its impact on competition be appraised.

A *per se* rule deliberately and indiscriminately confuses and condemns competitively innocuous or even wholesome practices along with harmful practices.[91] By reason of its bar to any consideration of the facts it facilitates the unwitting prevention of competition as in the Robinson-Patman Act when anti-competitively construed.

Fortunately in the recent past both the Commission and the courts have displayed an increasing realization of the importance of this analysis.[92] Consistency in the antitrust laws will replace confusion, and the laws themselves will be more effective in accomplishing their basic objectives, if attention is directed to what is and what is not competition and then, under a "rule of reason", a determination is made as to the true impact of challenged conduct on the competitive system.

At this writing it is probably still too soon to make a final decision concerning the permanency of the reoriented thinking in the areas discussed. If it is a temporary phenomenon, instances and areas of conflict between Sherman Act principles and Robinson-Patman Act pricing proscriptions will multiply. But if the present trend should deepen and broaden—and there are many indications that this will happen—then competitive pricing should flourish, and more effective competition will develop in the business world.

84. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953).

85. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. §13(f).

86. 346 U.S. 61 at 71.

87. *Id.* at 73-4.

88. *Ibid. Automatic Canteen* has been followed by Commission's dismissal of several complaints. *Safeway Stores, Inc.*, F.T.C. Docket 5590, CCH Trade Reg. Rep., Par. 11,474 (1953). *Kroger Co.*, F.T.C. Docket 5991, CCH Trade Reg. Rep., Par. 11,513 (1953); *Crown Zellerbach Paper Co.*, F.T.C. Docket 5491, CCH Trade Reg. Rep., Par. 11,466 (1953); also, *Philco Corporation* was dismissed in the Sylvania case, *supra*, note 71. Where, however, the Commission expected to prove the requisite element of knowledge, the *Automatic Canteen* case has been viewed as not requiring dismissal, *Bordon-Aicklen Auto Supply Co.*, F.T.C. Dockets 5766, 5767, CCH Trade Reg. Rep., Par. 11,710 (1954).

89. *Op. cit. supra* note 86 at 78.

90. The present F.T.C. majority sees no basic conflict between the Sherman Act and the Robinson-Patman Act, properly construed. As Chairman Howrey put it, "It is the view of the present majority of the Commission that this conflict [between one viewpoint condemning price fixing and the other encouraging price stabilization] is unnecessary, that the gearing of the privilege to compete with the obligation to compete fairly, is not inconsistent except as made so by strained statutory interpretation." Howrey letter, *op cit. supra* note 81.

91. "Most individual business acts—merging, agreeing, or competing—provide on their face, at best, no more than equivocal evidence of their underlying character or aim. Accordingly, it would be the height of folly either to sanction or to proscribe them *per se*. 'Suppressing competition' cannot be defined as clearly as 'sneezing.' It can only be inferred from a complex series of actions and consequences." Kahn, *op. cit. supra* note 79, at 51.

92. "On several occasions, as Chairman of the Federal Trade Commission, I have taken the strong position that the Commission should not further extend the per se doctrine; that, except where the Supreme Court or Congress has directed otherwise, the Commission should determine competitive effects by examination, analysis and evaluation of relevant market facts." *Economic Evidence in Antitrust Cases*, address by Edward F. Howrey, Chairman, Federal Trade Commission, before American Marketing Association, June 14, 1954. New York Times, June 15, 1954, page 43.

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